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No. 12815

2676

United States
Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

STATE CENTER WAREHOUSE & COLD
STORAGE COMPANY,
Respondent.

Transcript of Record

Petition for Enforcement of Order of the
National Labor Relations Board

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States of America
Before the National Labor Relations Board
Twentieth Region
Case No. 20-CA-228

In the Matter of

STATE CENTER WAREHOUSE & COLD
STORAGE COMPANY

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF
AMERICA, LOCAL No. 431

COMPLAINT

It having been charged by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, that State Center Warehouse & Cold Storage Company has engaged in and is now engaging in certain unfair labor practices as set forth in the National Labor Relations Act, as amended, 29 U.S.C.A. 141 et seq. (Supp. July 1947), herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board, herein called the Board, by the Regional Director for the Twentieth Region, designated by the Board's Rules and Regulations—Series 5, as amended, Section 203.15, hereby issues his Complaint and alleges as follows:

I.

State Center Warehouse & Cold Storage Company, hereinafter called the Respondent, is, and at all times material herein has been, a corporation organized under the laws of the State of California. It is engaged in warehousing activities, including the receiving and storing of furniture, grocery products, agricultural products, and other commodities and manufactured items, and maintains its only office and warehouse located at 747 "R" Street, Fresno, California.

During the year 1948, the State Center Warehouse & Cold Storage Company stored merchandise in excess of Two Hundred Fifty Thousand Dollars (\$250,000.00) by value, over sixty per cent of which was shipped by rail to or from points outside the State of California. The receipts of Respondent during the year 1948 were in excess of Seventy-five Thousand Dollars (\$75,000.00), representing payment for goods transported in interstate shipments.

II.

At all times herein mentioned, the Respondent, in the course and conduct of its business as Fresno, California, has caused and continues to cause substantial amounts of merchandise to be shipped to and from points outside the State of California.

III.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Lo-

cal No. 431, herein called the Union, is a labor organization within the meaning of Section 2 (5) of the Act.

IV.

The Respondent, by its officers and agents, commencing on or about February 10, 1949, and at all times thereafter, did interfere with, restrain and coerce its employees by engaging in the following acts and conduct:

1. On or about February 10, 1949, and at various times thereafter, threatening to close the plant if its employees supported the Union.

2. On or about February 10, 1949, and at various times thereafter, promising extra employment benefits if the employees voted against the Union.

3. On or about February 10, 1949, and at various times thereafter, interrogating the employees with respect to their Union membership.

4. On or about February 12, 1949, and at various times thereafter, stating that the employees who had joined the Union had been discovered by the Company.

5. On or about February 12, 1949, and at various times thereafter, threatening to fire anyone who signed up for the Union.

6. On or about March 11, 1949, and at various times thereafter, terminating extra employment benefits of employees because of Union activities.

V.

Respondent, by its officers and agents, did, on or about April 12, 1949, discharge Moses Machoian

from its employ in its Fresno warehouse because of his membership in or activity on behalf of the Union, for the purpose of discouraging membership in the Union or in any labor organization, and at all times since such date has refused to reinstate Moses Machoian because of his membership in or activities on behalf of the Union, for the purpose of discouraging membership in the Union or in any other labor organization.

VI.

By the acts described in Paragraph V, the Respondent did discriminate and is now discriminating in regard to the hiring and tenure of employment and terms and conditions of employment of said Moses Machoian, and did thereby discourage membership in labor organizations and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

VII.

By the acts described in Paragraphs IV, V, and VI above, the Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, and did thereby engage in unfair labor practices and is thereby engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

VIII.

The acts of the Respondent set forth in para-

graphs IV, V, and VI, above, occurring in connection with the operations of the Respondent described in paragraphs I and II, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states of the United States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IX.

The aforesaid acts of the Respondent, as set forth in paragraphs IV, V, and VI, above, and each of them, constitute unfair labor practices within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 25th day of October, 1949, issues his Complaint against State Center Warehouse & Cold Storage Company, the Respondent herein.

[Seal] /s/ GERALD A. BROWN,

Regional Director, National
Labor Relations Board.

[Title of Board and Cause.]

ANSWER

Now comes the Respondent, State Center Warehouse & Cold Storage Company, and answering the complaint on file herein, denies, admits, and avers as follows:

I.

Respondent denies the allegations of Paragraph I of the complaint; except that respondent admits that it is, and at all times material herein has been, a corporation organized under the laws of the State of California; respondent admits that it is engaged in warehousing activities, including the receiving and storing of furniture, grocery products, agricultural products, and other commodities and manufactured items, and maintains its only office and warehouse located at 747 "R" Street, Fresno, California.

II.

Respondent denies the allegations of Paragraph II of the complaint.

III.

Respondent admits the allegations of Paragraph III of the complaint.

IV.

Respondent denies the allegations of Paragraph IV of the complaint.

V.

Respondent admits that it did on or about April 12, 1949, discharge Moses Machoian from its employ in its Fresno warehouse; but denies that it discharged Moses Machoian because of his membership in or activity on behalf of the Union, for the purpose of discouraging membership in the Union or in any labor organization, and denies that at all times since such date it has refused to reinstate Moses

Machoian because of his membership in or activities on behalf of the Union, for the purpose of discouraging membership in the Union or in any other labor organization.

VI.

Respondent avers that it did on or about April 12, 1949, discharge Moses Machoian from its employ in its Fresno warehouse, by reason of the fact that Moses Machoian persisted, despite frequent warnings to desist, in smoking while at work, contrary to respondent's rules and regulations, of which Moses Machoian was at all times material well aware.

VII.

Respondent denies the allegations of Paragraphs VI, VII, VIII and IX of the complaint.

Wherefore, Respondent prays that the Board find that no unfair labor practices have been committed by respondent, and that respondent has not acted in contravention of any of the provisions of the National Labor Relations Act, 49 Stat. 449 (1935), as amended by the Act of June 23, 1947, c.120.

/s/ HOWARD B. THOMAS,

Attorney for Respondent.

STATE CENTER WARE-
HOUSE & COLD STORAGE
COMPANY,

By /s/ TWODI P. MOSESIAN,

President.

Duly verified.

Received October 31, 1949.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND
RECOMMENDED ORDER

Statement of the Case

Upon a first amended charge filed June 27, 1949, by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, herein called the Union, the General Counsel of the National Labor Relations Board,¹ by the Regional Director of the Twentieth Region (San Francisco, California), issued a complaint dated October 25, 1949, against State Center Warehouse & Cold Storage Company, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act as amended (61 Stat. 136), herein called the Act. Copies of the complaint, the charge, and the notice of hearing were duly served on the Respondent and the Union.

With respect to the unfair labor practices the complaint alleged in substance that the Respondent on or about April 12, 1949, discharged Moses Machoian and thereafter refused to reinstate him because of his union membership and activities, thereby discriminating against him in order to dis-

¹The General Counsel and his representatives are herein referred to as the General Counsel and the National Labor Relations Board as the Board.

courage membership in the Union; and that by the above and other stated acts on February 10 and 12, and March 11, 1949, Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in the Act.

By its answer filed October 31, 1949, Respondent admitted certain of the allegations of the complaint but denied the commission of any unfair labor practices. The answer admitted the discharge of Machoian but pleaded affirmatively that the cause for the discharge was for smoking while at work, contrary to Respondent's rules and regulations and despite frequent warnings to desist. By oral amendment allowed at the hearing it was further averred that while smoking was the immediate cause of the discharge, other cumulative causes were Machoian's "singing, dancing, and loud talking on respondent's warehouse premises during working hours, which disturbed the other employees and interfered with the proper performance of their work and the work of Moses Machoian himself."

Pursuant to notice a hearing was held on February 14, 15, 16, and 25, 1950, in Fresno, California, before George A. Downing, the undesignated Trial Examiner, duly designated by the Chief Trial Examiner. The General Counsel and the Respondent were represented by counsel. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertaining to the issues was afforded all parties.

At the conclusion of the General Counsel's case in chief, the Examiner granted Respondent's mo-

tion to dismiss paragraph IV (1) of the complaint which had alleged threats to close the plant if the employees supported the Union, and paragraph IV (2) which had alleged promises of benefits if the employees voted against the Union, in proof of which no evidence had been offered. However, the General Counsel was given leave to move for the reinstatement of said allegations by amendment provided any evidentiary basis existed therefor upon conclusion of the entire case. The General Counsel subsequently moved for such an amendment as to paragraph IV (1), and his motion was granted.

Respondent also moved, on conclusion of the General Counsel's case, for a dismissal of the complaint in its entirety. The motion was denied. Respondent also moved to strike a portion of the testimony of Edward Ejadian concerning an alleged message to Machoian given Ejadian by his mother-in-law, Agnes Azidigian. Ruling was reserved. The motion is now hereby granted since, on completion of the case, the record contained no evidence which connected that part of the message to Respondent.

At the conclusion of the hearing the Examiner denied Respondent's motion to dismiss the complaint insofar as it alleged that Machoian had been discriminatorily discharged. The parties were afforded an opportunity to make oral argument and to file briefs, proposed findings of fact, and conclusions of law. The parties waived oral argument and briefs.

Upon the entire record in the case and from his

observation of the witnesses the undersigned makes the following:

Findings of Fact

I. The Business of Respondent

State Center Warehouse & Cold Storage Company is a California corporation. It is engaged in warehousing activities such as receiving and storing agricultural products, groceries, furniture, and other items.

Paul A. Mosesian & Son, Inc., is a California corporation engaged in the raising, growing, packing, and shipping of various types of fruits, such as grapes, plums, peaches, apricots, nectarines, etc.

The stock in both corporations is owned by Twodi P. Mosesian, Mary P. Mosesian, and Louise P. Mosesian. Those principal stockholders are also the officers of both corporations. The officers of Mosesian, Inc., are President Twodi P. Mosesian; Secretary Mary P. Mosesian; and Treasurer Louise P. Mosesian. The officers of State Center are President Twodi P. Mosesian; Secretary Louise P. Mosesian; and Treasurer Mary P. Mosesian.

The principal offices of both corporations and of their officers are located in the warehouse building, owned by Mosesian, Inc., at 747 R Street, in Fresno. Both corporations use the same office space and the same clerical force consisting of three people, although one of them is carried on the pay roll of State Center and two on the pay roll of Mosesian, Inc. The two corporations have separate pay rolls, separate bookkeeping systems, and separate bank accounts.

Mosesian, Inc., owns in excess of 3,000 acres of fruit lands, all in California. During the year 1948 the sale of fruits and other products from these holdings exceeded \$200,000, over 50 per cent of which was sold outside the State of California.

State Center was set up primarily as an added facility for Mosesian, Inc., to be used as a cold storage unit for those fruits which could not be shipped immediately into the commercial market and to be used as a warehouse depot for other supplies necessary to the running of the ranch properties of Mosesian, Inc. Secondarily, State Center was established to accept merchandise of other companies in the vicinity for storage.

For the year 1948, over 60 per cent of the materials received for storage, such as groceries, furniture, and fiber board boxes, were shipped by rail from points outside the State of California. The value of the merchandise stored during 1948 is unknown but would probably exceed \$100,000. For providing storage and other facilities State Center received \$37,483.75 during the year 1948. During that period it shipped outside the State of California 1 carload of flour, 1 carload of dried fruit, and approximately 17 carloads of grapes which had been stored in its cold storage unit by Mosesian, Inc. It is estimated that the value of the grapes alone exceeded \$25,500.

State Center acts as a local distributor for the following companies: Hulman and Co., Terre Haute, Indiana, manufactures of Clabber Girl Baking Powder; Southern Cotton Oil Co., Gretna, Louisiana, manufacturers of Wesson Oil and Snow Drift

products for the Wesosn Oil and Snow Drift Company; J. B. Ford Products Co., Wyandotte, Michigan, manufacturers of cleaning and scouring powders; Fisher Flour Co., Seattle, Washington; Corn Products Sales Co., New York City, as well as for other companies located in the State of California.

Respondent admits and it is hereby found that the Respondent is engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, is a labor organization admitting to membership employees of Respondent.

III. The Unfair Labor Practices

A. Background and Preliminary Events

The Respondent is a family corporation whose affairs are actively managed by Mrs. Twodi P. Mosesian, a widow, and by her daughters, Louise Mosesian and Mary Mosesian. Violet Misakian, an office employee, is also a cousin of the Mosesians. They and all other witnesses except W. H. Justice and Field Examiner Phoenix, are Armenian.

The offices are located within the warehouse building and the Mosesians spent a large part of their time in the offices during the period pertinent to the issues herein.

W. H. Justice (who is conceded by Respondent

to be a supervisor) is the warehouse foreman and as such supervised the warehouse crew in the loading and unloading of cars and the proper placing and stacking of merchandise in the warehouse. However, the Mosesians themselves also closely supervised the warehouse activities; Mrs. Mosesian testified that "when Justice isn't around, I would go around to supervise to see whether people were doing their work or not."

The regular warehouse crew consisted of a staff of not over four or five employees, although at times itinerant help or ranch hands of Paul A. Mosesian, Inc., swelled the number of persons working in the warehouse.

The evidence herein related chiefly to the period of Machoian's employment, from November 18, 1948, to his discharge on April 12, 1949; and little of significance to the issues occurred prior to the inception of union activities around the middle of January, 1949.

The initial effort to form a union was an abortive one. Machoian first became interested in the Union and after discussion among the warehouse employees (except Harry Ekzoozian),² Machoian was selected to get the necessary application papers from the

²It is clear that the other employees omitted Ekzoozian from their union discussions and activities and that he did not become a member or otherwise participate in the activities. Machoian explained at one point that the other employees did not talk to Ekzoozian about the Union because they "didn't trust Harry" (apparently because they felt he was too close to the Mosesians).

Union. He did so, and some of the employees signed them. Two hours later, however, those who had signed changed their minds, turned their papers back, and they were thrown away. Although no explanation was made, it appears probable that it was because only two of the four (excluding Ekzoozian) had signed.

About 2 weeks later the four of them (Machoian, Edward Ejadian, Bob Krikorian, and Bill Eccles, who comprised the whole crew except Ekzoozian) again decided to join the Union and did so. The date of the joining is definitely fixed by Machoian's membership card as January 27, 1949.

On February 8, 1949, the Union filed a representation petition and Respondent was notified of the filing by letter from the Board's Twentieth Region dated February 10, 1949, and received a day or so later. The election was held March 10, 1949, and on March 18, 1949, the Union was certified by the Board as the bargaining representative for all warehouse and truck driver employees of Respondent.

The foregoing findings on facts which were preliminary to the alleged unfair labor practices are based on evidence which is not disputed. However, when the testimony approached the field of the commission of the alleged unfair labor practices, an entirely different picture was presented. On those questions the evidence was in sharp and irreconcilable conflict; in fact, the testimony of some of the individual witnesses was confused, shifting, and self-contradictory on many important details. The

latter circumstance was sometimes accounted for by the fact that some of the witnesses did not speak or understand English too well but nevertheless attempted to answer questions whose meaning they guessed at or which they had not clearly understood. Furthermore, the Examiner is convinced that some of the witnesses were not telling the truth on many essential points, indications of which fact are readily apparent in the rather frequent instances where witnesses were confronted with prior inconsistent statements for the purpose of refreshing their recollections and for impeachment purposes. These circumstances have rendered the resolution of questions of credibility especially difficult.

From his observation of the attitude and demeanor of the witnesses on the stand and their manner of testifying, the Examiner is able to credit in its entirety only the testimony of Bob Krikorian and W. H. Justice, who were called by the Respondent. So far as their testimony is relevant, the findings herein made have been constructed on it as a base, and all other testimony which cannot be reconciled with theirs is not credited.

On matters not covered by the testimony of Krikorian and Justice, the findings are based on a reconciliation of sharply conflicting testimony, with due appraisal of the interest and the relationships between the witnesses. These include the close and clannish family relationship between the Mosesians and between Misakian and the Mosesians; the close personal and social friendship between Michael

Sohigian and the Mosesians and the less close, but nevertheless, social relationship existing between Ekzoozian and the Mosesians. Significance was also accorded to, and appraisal made of, the fact that current employees when called by the General Counsel testified with reluctance against their Employer whereas ex-employees testified freely and without evidence of constraint. Machoian's testimony has also been accepted only in part, due accord having been given in his case to his interest in the outcome and to his exaggerated and somewhat imaginative testimony on some points and to inaccuracies on others, such as his denial of the existence even of the stencilled "No Smoking" signs on some of the pillars in the warehouse.

B. Interference, Restraint, and Coercion

Louise Mosesian testified that the Mosesians first learned of union activities about 2 weeks prior to February 10, 1949, when they were informed by their labor consultant that he had received a call from the union representative that the warehouse employees had organized. The consultant informed them that they would have to have an election and they left the matter in his hands. That testimony is credited.

On some date which is established by the evidence as a whole as occurring shortly after the receipt by the Mosesians of the Board's letter of February 10, 1949, Louise Mosesian came into a box car which was being loaded by Machoian, Ejadian, Ekzoozian, Eccles, and Krikorian. Krikorian testified that

Louise asked "if any of [them] had spoken to anybody." They all said they had not. She then asked each one of them individually if he had joined the Union, and each denied having done so. Louise then said, "I know who has already signed, but you don't have to tell me. I am going to find out anyway." She then turned to Ekzoozian and asked him whether "Mama" (as Mrs. Mosesian was frequently referred to in the record) had not "always kept 4 or 5 men working in the warehouse even in tough times," and Ekzoozian agreed that she had. Louise continued, "Mama could always shut (the warehouse) or rent it out."

Machoian's testimony corroborates Krikorian as to the occurrence of the incident and as to the inquiries by Louise as to union membership but differs materially as to the exact content of the statements made. Louise Mosesian categorically denied the incident and denied being in the box car on any such occasion. Ekzoozian, though testifying that Louise did come into the box car on one occasion and speak to a group of the men, stated that she only made some remark to hurry the men up in their work. Ekzoozian testified further that he was never present on any occasion in a box car when Louise made any reference to the Union. Ejadian, although called as a witness on both sides, was not questioned specifically about the incident.

It is found that the incident occurred substantially as testified to by Krikorian, who was corroborated as shown above by Machoian.

Machoian testified to another incident in the box

car occurring about 3 days later when the same group (except Eccles) was present and when Louise came in and accused him of organizing the Union, saying:

“Listen, Mose, you are the guy that makes these people union. You organized the union here, because * * * we asked Mr. Sohigian, and Mr. Sohigian said you do the same thing over his place, you organized the union over there, and you give all the peoples’ name, and you are the one who organized here. We are sure you are the one.”

Machoian testified further that he admitted having organized the Union at Sohigian’s (his former employer), but denied he had done so at the warehouse, and that Louise then left the car. Machoian also testified that he and Ekzoozian then got into a hot argument when he accused Ekzoozian of “squealing” on him about the Union; that Ekzoozian stated he was “going right over to the office and tell them they are going to lay you [Machoian] off. The Union can’t work any more over here”; and that Ekzoozian did not go right to the office.

Louise and Ekzoozian denied that she made the statements attributed to her by Machoian, and Krikorian did not corroborate that part of Machoian’s testimony. Krikorian did corroborate Machoian as to his argument with Ekzoozian, testifying that Ekzoozian told Machoian that Sohigian had said that Machoian had been fired on account of union activities at his place; that they were arguing about it; and that the argument was terminated by Ekzoozian’s threat to have Machoian fired and by

Ekzoozian's departure for the office in an apparent effort to carry out that threat.

Krikorian testified that Louise was not in the box car on the occasion and that only he, Ekzoozian, and Machoian were present on the occasion. Krikorian's version of the incident is credited. According to it, Sohigian made to Machoian statements similar to those which Machoian attributed to Louise. It is therefore, concluded, and found that the statements testified to by Machoian and Krikorian were actually made by Ekzoozian and that Machoian was mistaken in attributing them to Louise.

Ejadian was not questioned specifically about the second incident in the box car nor was he questioned about any argument between Machoian and Ekzoozian. Ekzoozian, though admitting the argument with Machoian, testified that it concerned only the question whether Sohigian had been at home on a certain evening. His testimony is not credited.

Krikorian testified further that he later spoke to Louise asking her if she was going to fire Mose and that she said, "No, he is a good worker." Louise denied ever discussing Machoian with Krikorian. Krikorian's testimony is credited.

That Machoian and his union activities had in fact been a subject of discussion between Sohigian and the Mosesians is established by Sohigian's admissions that he had engaged in such discussions with the Mosesians at their home before the election. Ekzoozian's testimony also discloses that he was present at the Mosesians' home on occasions when Machoian was being discussed with Sohigian.

Krikorian also testified to another occasion when he happened to meet Louise in the warehouse and when she said, "I know you will vote against the union [in the election], but how about Ejadian?", and that he replied that Eddie would vote the same as he. Louise denied the incident. Krikorian's testimony is credited.

Agnes Azidigian, who was Ejadian's mother-in-law and who did housework for the Mosesians, testified that Mrs. Mosesian gave her a message to deliver to Ejadian to the effect that "if Eddie belonged to the union she wouldn't keep him." On cross-examination Azidigian testified the message was that "if warehouse become Union [she] don't keep like these workers—[get] better workers." She testified that she gave the message to Ejadian, and he corroborated her testimony. His testimony of the content of the message closely paralleled that testified to by Azidigian, his final version being that "if we join the union she was going to get better men." Mrs. Mosesian denied having discussed the subject of the Union with Azidigian. Her denial is not credited.

Mrs. Azidigian became quite confused as to the time of the occurrence of the incident, but Ejadian's testimony fixes it definitely as having occurred before the election. It is so found.

The General Counsel also contended that Respondent had, because of Ejadian's union activities, deprived Ejadian on or about March 26, 1949, of extra employment consisting of cleaning the office 30 minutes each morning and of certain yard and

gardening work at the Mosesian home on occasional Saturdays. The preponderance of the evidence does not support that contention. There is no evidence from which an inference can be drawn that Ejadian's union activities were responsible for such acts except the testimony of Azidigian and Ejadian just referred to. Even if such evidence were ordinarily to be considered as affording an adequate basis for such an inference (cf. Texas Company, 80 NLRB 862), other evidence introduced by Respondent furnished a reasonable explanation and a credible basis for the changes. Thus, Mrs. Mosesian and Louise testified credibly that on an early morning drive past the warehouse on a trip to their ranches, they had seen Ejadian leaving the warehouse carrying something in a gunnysack. Though they did not wish to accuse him of pilfering, they decided to prevent him from having further access to the warehouse except during normal working hours. Without making any explanation they later simply requested him to surrender the key, and they thereafter assigned the cleaning work to Ekzoozian. At about the same time they stopped calling Ejadian to do the occasional yard work at their home. This was partly due to his slowness in performing the work and to the fact that they found it a more satisfactory arrangement to use the services of a Mexican ranch hand who had begun to occupy the upstairs garage at the home. In any event, the preponderance of the evidence as a whole fails to support the General Counsel's contention that Ejadian's union membership furnished any part of the motive.

It is concluded and found that by the following statements and inquiries, Respondent engaged in interference, restraint, and coercion within the meaning of Section 8 (a) (1):

Louise Mosesian's inquiries in the box car as to the employees' union membership, her statement that she already knew who had signed and her threat, in the face of their denials, to obtain the information elsewhere; her statement or threat on the same occasion that her mother could always shut-down the warehouse or rent it out.

Louise Mosesian's statement to Krikorian relative to his voting against the Union in the election, and her inquiry of him as to how Ejadian would vote.

Mrs. Mosesian's message to Ejadian, delivered through Azidigian, that if the warehouse became Union, she would release those [union] workers and get others.

C. The Discriminatory Discharge of Moses Machoian

Machoian testified that after the occasion of his argument with Ekzoozian and the latter's threat to have him fired nothing more was said to him until Tuesday, April 12, a pay day. At 5 o'clock, closing time, he went to the office, got his pay check, and walked out onto the platform. Mrs. Mosesian followed him out and called to him. She told him, "You are going to get laid off." He inquired "What is the matter, no work?" She replied, "That is my business, and when we need you, we will call you back by telephone." He was never recalled.

Mrs. Mosesian testified that she had caught Machoian smoking twice on the day of the discharge, once in the morning and once in the afternoon; that Ekzoozian was present on both occasions; and that on the first occasion she had warned Machoian that if she caught him smoking again she would have to discharge him. Ekzoozian corroborated that testimony as to the two incidents, though his testimony was extremely confused and contradictory as to details. Machoian denied that any such incidents had occurred. He admitted freely that he smoked in the warehouse but testified that the other employees, as well as Justice, also did so frequently. He also admitted that he sometimes sang Armenian and Turkish songs but denied that he had ever been reprimanded for it or that he had been threatened with discharge either for smoking or singing.

Mrs. Mosesian testified that when she stopped Machoian on the platform at closing time she told him "You are a dangerous man and I don't want you to be around the place and because of your smoking I have to send you away. I have to discharge you."

Since Machoian's smoking "contrary to respondent's rules and regulations" was pleaded by Respondent as the chief and immediate cause of his discharge and since, according to Mrs. Mosesian's testimony, it was the only cause assigned at the time of the discharge, that defense will be first considered.

First, the credible evidence does not establish Respondent's contention that it had any "rules and

regulations" which prohibited smoking throughout the warehouse. There is evidence that Mrs. Mosesian usually informed the employees when they were hired or later that they should not smoke inside the warehouse and that she and her daughters also sometimes cautioned various employees about smoking in the warehouse. However, as is established by the testimony of Respondent's witness, Justice, such cautions were generally understood to apply only to portions of the warehouse where the more inflammable materials were stored. Indeed, Justice admitted that the Mosesians had never informed him that there was any rule against smoking.

It is true that there were at the north end of the warehouse a number of small "no smoking" signs approximately 1 inch high stencilled on the concrete pillars. But these were of ancient origin, Louise Mosesian admitted, having been placed there in 1918, when the warehouse was being built, by the former owner whose name appeared under the signs. The evidence establishes that they were consistently ignored. Indeed, the stencilled signs were so shrouded in antiquity that Louise had been unable to recall when interviewed by a field examiner several months before the hearing whether they were actually on the pillars at the time of the interview or during the period of Machoian's employment.

Respondent also offered testimony that it had posted at various points throughout the warehouse during Machoian's employment other cardboard "no smoking" signs, but that the men would not

permit them to remain or would scratch them out. That testimony was, however, contradicted and disputed by other testimony offered by Respondent. Thus Ejadian, when testifying as Respondent's witness, stated that there were never any "no smoking" signs [other than the stencilled ones] in the warehouse until June 27, 1949 [the day before his interview by a field examiner], and that for the first time then about five or six paper "no smoking" signs were put up in the warehouse. Furthermore, Respondent's witnesses Justice and Krikorian testified to the existence of no such cardboard signs, and Machoian denied that there were any there during his employment.

It is concluded and found from the evidence as a whole that the only "no smoking" signs in the warehouse during Machoian's employment were the ancient stencilled signs on the concrete pillars, mainly at the north end of the warehouse. It is also clearly established that such signs were wholly ignored and that occasional cautions or reprimands from the Mosesians were shrugged off and openly disobeyed.

Justice frankly admitted smoking in the warehouse and customarily went about with a pipe or cigar in his mouth before the other employees. Although the Mosesians and Ekzoozian consistently contended throughout their testimony that Justice's pipe and cigar were unlit when he was in the warehouse, their testimony is not credited in view of Justice's own testimony to the contrary, as well as that of Krikorian and Machoian.

Indeed, Krikorian testified that Justice smoked all around the men, and that he had also seen Mrs. Mosesian smoke in the warehouse. Krikorian also testified that he, himself, as well as the other warehouse employees, customarily smoked in the warehouse and that he could not say that any one of the them smoked any more than the others. He admitted that as a general rule he and the other warehousemen did not smoke before the Mosesians, that he never smoked in front of Mrs. Mosesian "if [he] could help it," and that she caught him smoking once and reprimanded him for it.

The testimony of Justice and Krikorian, which was offered by the Respondent, is particularly persuasive in rebutting and impeaching the testimony of the Mosesians and Ekzoozian that there was any recognized or enforced rule against smoking in the warehouse. Furthermore, Ejadian's testimony, when called by Respondent, that the first cardboard signs were put up 21½ months after Machoian's discharge, in the face of insistence by the Mosesians that they had been in the warehouse throughout the period of Machoian's employment, persuades the undersigned that Respondent's defense that it fired Machoian for smoking was a synthetic one, manufactured as an afterthought after Machoian's discharge and after service upon it of a copy of the original charge alleging that Machoian had been discharged because of union activities.

These circumstances explain Mrs. Mosesian's failure (as testified by Machoian) to assign a reason for his discharge. Mrs. Mosesian's contrary testi-

mony that she assigned his smoking as the reason is not credited. Nor is her testimony credited that she had "caught" him smoking twice on the day of the discharge and had on the first occasion threatened to discharge him if she caught him again.³ Although Louise and Mary Mosesian testified that their mother had announced her intention of discharging Machoian for smoking and had, on her return to the office, stated that she had discharged him for smoking, Misakian, who was also present testified that Mrs. Mosesian said only that she "told him not to come back to work anymore." That this was the exact gist of the discharge statement was corroborated by Ekzoozian's testimony that when he inquired of Machoian immediately after the discharge what Mrs. Mosesian had said, Machoian stated that she had told him only "don't come down to work tomorrow."

In summary the following facts are of significance in concluding that Machoian was not discharged for smoking.

There was no rule against smoking at all points throughout the warehouse. It is inconceivable that there could have been one as contended by the Mosesians without Justice having been aware of it.

³It is quite possible that she may have seen Machoian smoking twice on that day, and that she may have called Ekzoozian's attention to it, as they both testified. Such fact, if it is true, is considered and found to have been only part of Respondent's plan to manufacture ostensible grounds for Machoian's discharge.

At most, the occasional cautions were directed at preventing or minimizing smoking in sections of the warehouse where the more inflammatory materials were stored.

Although the Mosesians occasionally cautioned employees against smoking they had in no instance warned or threatened any employee with disciplinary action and certainly not with lay-off or discharge. Mary Mosesian's testimony that on some earlier occasion an employee had been discharged for smoking is not corroborated by any witness and is not credited.

Even assuming the existence of a rule against smoking in all or any part of the warehouse, it was disregarded with impunity by the warehouse foreman and by all the crew (cf. *Paragon Die Casting Company*, 27 NLRB 878). As Mrs. Mosesian aptly explained in denying that she smoked in the warehouse, "if I smoked the others would see me smoking. They would do likewise." But there is credible evidence offered by Respondent (Krikorian's testimony), and it is found, that Mrs. Mosesian did smoke in the warehouse. The employees, having seen her and Justice smoking there in open disregard of the alleged rule and in the face of occasional cautions, followed their example and did likewise, as Mrs. Mosesian conceded was only natural.

In this setting there was no legitimate basis for suddenly discharging Machoian for violating an alleged rule or warning that had been consistently and universally disregarded by all of the employees as well as by Justice and Mrs. Mosesian herself.

The belated pleading at the hearing of additional reasons for the discharge also cast a dubious shadow upon the bona fides of Respondent's original defense. Though termed "cumulative causes," the additional reasons were not shown by Respondent to have had any bearing on Machoian's discharge. Thus, the incidents of singing, dancing, and loud talking, of which Respondent complained in its oral amendment had occurred some time prior to the discharge.⁴ Machoian was not disciplined or threatened with discharge. The evidence shows that Louise Mosesian was the one who appeared to be chiefly annoyed by Machoian's exuberance and that the usual content of her reprimands, was to "shut up" or "pipe down" and "we can't concentrate in the office."

Though Louise testified that she reported such incidents to her mother, there is no evidence which connects them with the actual discharge. Thus, Mrs. Mosesian's own testimony was that in discharging Machoian, the only reason she assigned was his smoking. Mary Mosesian testified similarly that her mother had stated only that she had discharged Machoian because of his smoking. Actually, as previously found, no reason was assigned.

Furthermore, Louise Mosesian also testified that she had never discussed with her mother the possibility of Machoian's discharge, and she had also

⁴The latest occasion which Louise Mosesian could fix in point of time was "just after the first of the year."

given a prior affidavit to a field examiner that she, herself, had nothing to do with Machoian's discharge and that her mother made the decision to discharge Machoian without consulting anyone.

The evidence also disclosed Krikorian's admissions that he, himself, sang loudly in the warehouse and that he was one time reprimanded by Louise for singing. She said simply "if you want to sing, go home and sing."

At various points throughout the hearing Respondent adduced evidence that Machoian was somewhat incapacitated by reason of an injury to his finger, that Ekzoozian and Ejadian complained to Louise and Mary that Machoian could not do his share of the work, and that they, in turn, transmitted the complaints to Mrs. Mosesian. Though formally disclaiming that Machoian's incapacity formed any part of the cause of his discharge, Respondent's counsel continued to elicit testimony to the foregoing effect. What bearing such evidence had upon the discharge is left wholly obscure. It is clear, in any event, that the added reason was not a contributing, much less the proximate, cause for the discharge. The continued eliciting of such evidence would seem to reflect Respondent's doubt of the validity of its pleaded defenses and to constitute an attempt belatedly to suggest an additional reason why Machoian might have been discharged, not why he was.

The evidence summarized above discloses and it is found that Machoian was not discharged for any of the reasons pleaded by the Respondent.

Though an employee may be discharged for a good reason, a poor reason, or no reason at all so long as the terms of the statute are not violated (*N.L.R.B. v. Condensor Corporation*, 128 F. 2d 67 (C.A. 3)), nevertheless a failure to give a reason or the later giving of shifting and implausible reasons may be considered in determining the question of fact as to the real motive for the discharge (cf. *ibid*). Significantly, Respondent does not contend that it discharged Machoian for no reason at all. If any of the causes now assigned had actually existed, no reason appears why Respondent would not have informed Machoian for which one or more of them he was being discharged. Yet, as has been found, no cause was assigned on the occasion.

The series of shifting and implausible reasons advanced by the Respondent fail to explain Machoian's discharge on a nondiscriminatory basis. Although the assertion of such reasons may not of itself establish that Machoian's discharge was based on a discriminatory motive, yet it points unmistakably in that direction.

The Board has held that the discharge of a union employee because of a violation of plant rules was discriminator where the rules did not, in fact, exist. *Wyman-Gordon Company*, 62 NLRB 561. It has also held that evidence that violation of a no smoking rule was customarily overlooked and not impartially enforced is a circumstance in finding that the discharge of a union employee allegedly for violation of the rule was discriminatory. *Lawrenceburg Roller Mills Company*, 23 NLRB 980; and see

Paragon Die Casting Company, *supra*. The Board has also held a discharge to be discriminatory although there were "no smoking" signs in the department and the employee had been previously reprimanded for smoking and threatened with a lay-off where it appeared that the penalty of discharge for smoking had rarely been invoked and that it was customary for employees to smoke secretly in the shop. Atlas Press Company, 32 NLRB 863.

There is other more affirmative evidence in the present record that Respondent discharged Machoian because of his union membership and activities.

First, as has been found, Machoian took the lead in the discussions and concerted activities which led to the formation of the Union. Despite the denials by the Mosesians, the record discloses that they were well aware of the part Machoian was playing. This is established by Sohigian's testimony that he had discussed Machoian's union activities with the Mosesians at their home (obviously, at a time when Ekzoozian was also present), and by Ekzoozian's later accusation of Machoian as the organizer of the Union, by his threat to have Machoian fired because "the union can't work here anymore," and his departure for the office to carry out his threat.

That Respondent did not immediately effectuate Ekzoozian's threat does not detract from the conclusions herein reached. The election was then imminent, and for obvious reasons it would have been desirable to avoid any appearance of discrimination or of interference with the election and to postpone any action to a time when the suggestion of

discrimination would not so readily appear.

Certainly the record as a whole discloses that respondent was determined from the outset to defeat union organization in the warehouse. That is plainly apparent from the statements, inquiries, and threats summarized under the preceding section of the Report. Certainly also Respondent's intention to discriminate is disclosed by Mrs. Mosesian's message to Ejadian that she would discharge current employees if the warehouse should become Union. Though that threat was not carried out immediately nor in its entirety yet in the relatively short space of 33 days after the election, Respondent discharged the leader in the union activities and later asserted in justification thereof the series of shifting and implausible reasons which have been found to be baseless.

It is therefore found on the basis of all the evidence that Respondent, on April 12, 1949, discharged Machoian because of his union membership and activities and has at all times since refused to reinstate him; that by said acts, Respondent discriminated against Machoian for the purpose of discouraging membership in the Union, and that it thereby engaged in unfair labor practices within the meaning of Section 8 (a) (3) of the Act. By said acts also Respondent engaged in interference, restraint, and coercion of its employees in the exercise of the rights guaranteed in Section 7 of the Act and thereby engaged in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set out in Division III hereof, occurring in connection with the operations of the Respondent described in Division I hereof, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Since it has been found that the Respondent engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondent discriminatorily discharged Moses Machoian on April 12, 1949, and thereafter discriminatorily failed and refused to reinstate him. Since Machoian testified that on or about January 24, 1950, he decided not to return to his former position, it will not be recommended that Respondent offer to Machoian reinstatement thereto. It will, however, be recommended that Respondent make Machoian whole for any loss of pay that he may have suffered by reason of such discrimination by payment to him of a sum of money equal to that which he normally would have earned as wages from April 12, 1949, to January 24, 1950, less his net earnings during such period (see Matter

of Crossett Lumber Company, 8 NLRB 440).

It having been found that Respondent has engaged in certain acts of interference, restraint, and coercion it will be recommended that the Respondent cease therefrom.

The violations of the Act which the Respondent committed are in the opinion of the Trial Examiner persuasively related to other unfair labor practices prescribed by the Act, and the danger of their commission in the future is to be anticipated from the Respondent's conduct in the past. The preventive purposes of the Act will be thwarted unless the order is coextensive with the threat. In order, therefore, to make more effective the interdependent guarantees of Section 7, to prevent a recurrence of unfair labor practices and thereby minimize the industrial strife which burdens and obstructs commerce and thus effectuate the policies of the Act, it will be recommended that the Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case the undersigned makes the following:

Conclusions of Law

1. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of Moses Machoian, thereby discouraging

membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record of the case, the Trial Examiner recommends that State Center Warehouse & Cold Storage Company, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, or in any other labor organization of its employees, by discriminatorily discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment;

(b) Interrogating its employees concerning their union membership or activities or as to voting in the election; threatening to ascertain who were members; threatening to shut the warehouse down or rent it out because of union activities; and threatening to release current employees and to hire others if the warehouse should become Union;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

(2) Take the following affirmative action, which the Trial Examiner finds will effectuate the policies of the Act:

(a) Make whole Moses Machoian for any loss of pay he may have suffered by reason of Respondent's discrimination against him by payment to him of a sum of money equal to the amount which he normally would have earned as wages during the period from the date of the Respondent's discrimination against him to January 24, 1950, less his net earnings during said period;

(b) Post at its Fresno, California, warehouse copies of the notice attached hereto marked Appendix A. Copies of said notice to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the receipt of this Intermediate Report and Recommended Order what steps the Respondent has taken to comply herewith.

It is further recommended that unless on or before twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order, the Respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the Board issue an order requiring the Respondent to take the afore-said action:

As provided in Section 203.46 of the Rules and Regulations of the Board any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Washington, D. C., an original

and six copies of a statement in writing, setting forth such exceptions to the Intermediate Report and Recommended Order or to any other part of the record or proceeding (including rulings upon all motions or objections) as he, or it, relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report and Recommended Order. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46 should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its find-

ings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 8th day of May, 1950.

/s/ GEORGE A. DOWNING,
Trial Examiner.

Appendix A

Notice to All Employees

Pursuant to

The Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, or any other labor organization of our employees, by discriminatorily discharging or refusing to reinstate any of our employees, or discriminate in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

We Will Not interrogate our employees concerning their union membership or activities or as to voting in the election; we will not threaten to ascertain who are members of the Union; we will not threaten to shut the warehouse down or rent it out because of union activities, nor threaten to release current employees and to hire others if the warehouse should become Union.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

We Will make whole Moses Machoian, for any loss of pay suffered as a result of the discrimination against him.

All our employees are free to become or remain members of said Union or any other labor organization.

Dated

STATE CENTER WAREHOUSE & COLD
STORAGE COMPANY,

(Employer).

By,

(Representative). (Title).

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

EXCEPTION TO THE INTERMEDIATE REPORT AND RECOMMENDED ORDER

Now comes the Respondent, State Center Warehouse & Cold Storage Company, and excepts to the Intermediate Report filed herein by Trial Examiner George A. Downing in that:

Exceptions to Findings of Fact

1. It is found in the first paragraph of Subsection III, page 3, that Violet Misakian is a cousin of the Mosesians. This infers a much closer relationship than exists as the evidence shows that their grandmother was the same person but they had different grandfathers.

2. It is found in the second paragraph of Subsection III, page 3, that W. H. Justice is a warehouse foreman and as such supervises the warehouse crew in the loading and the proper placing and stacking of merchandise in the warehouse. This finding infers that W. H. Justice is a general supervisor whose duties include those above mentioned, whereas the evidence is that W. H. Justice is only a supervisor of those enumerated activities and no others.

3. It is found in the third paragraph on page 4 that Machoian first became interested in the Union. This inference is that Machoian was the first to become interested in the Union. This inference is not substantiated by the evidence.

4. The Examiner states in the sixth paragraph on page 4 that he is convinced that some of the witnesses were not telling the truth because of the "rather frequent instances where witnesses were confronted with prior inconsistent statements for the purpose of refreshing their recollections and for impeachment." The Examiner infers that this reflects on the credibility of the testimony which is favorable to the Respondent. Not one of Respondent's witnesses was shown to have made a prior inconsistent statement. The Trial Examiner must be basing this observation on some statements or writings which are not found in the evidence.

5. It is found in the seventh paragraph on page 4, that all testimony, other than that of Bob Krikorian and W. H. Justice, which cannot be reconciled with their testimony, is not credited. This finding cannot be supported by the testimony nor does the Trial Examiner carry out this finding as he, in many instances, credits Machoian with truthfulness.

6. The finding in the first paragraph on page 5, that there is a close clannish family relationship between Misakian and the Mosesians is not substantiated by the evidence.

7. The finding in the first paragraph on page 5, of interest (thus discrediting his testimony) due to the social relationship existing between Ekzoozian and the Mosesians, is not substantiated by the evidence, which evidence indicates a much stronger social relationship between Ekzoozian and Machoian.

8. The finding in the first paragraph on page 5, that current employees, when called by the general counsel, testified with reluctance against their employer, whereas ex-employees testified freely and without evidence of constraint, is contrary to the evidence and is, in fact, completely rebutted by the Trial Examiner by giving great credence to the testimony of W. H. Justice who is a present employee.

9. The finding in the fourth paragraph of Section B, page 5, of the occurrence in the box car, is not substantiated by the evidence.

10. The finding in the third paragraph on page 6, that Sohigian made certain statements to Machoian, is not substantiated by any testimony in the record.

11. The finding in the fifth paragraph on page 6 is not substantiated by the evidence.

12. The finding in the sixth paragraph on page 6, that Machoian and his Union activities had been a subject of discussion between Sohigian and the Mosesians, is immaterial and ambiguous as there is no evidence that this discussion occurred prior to the charge of unfair labor practices. The finding infers that a discussion was prior to the charge; however, this inference is not substantiated by the evidence.

13. The finding in the seventh paragraph on page 6, that Louise Mosesian said, "I know you will vote against the Union, but how about Ejadian," is not substantiated by the evidence.

14. The finding in the eighth paragraph on page 6, that Mrs. Mosesian gave Agnes Azidigian a message to deliver to Ejadian, is not substantiated by the evidence.

15. The finding in the first paragraph on page 7, that the time of the occurrence of the alleged incident was before the election is contrary to the evidence.

16. The conclusion in the third paragraph on page 7, that Louise Mosesian questioned, and made certain statements to the employees concerning Union membership is not substantiated by the evidence.

17. The conclusion in the third paragraph on page 7, that Louise Mosesian made a statement or threat, that her mother could always shut down the warehouse or rent it out, is not substantiated by the evidence. This conclusion is also an erroneous interpretation of the testimony concerning the alleged incident, which error is caused by taking the statement out of its context. In its proper context the testimony is to the effect that Louise Mosesian asked Ekzoozian whether or not "Mama" Mosesian hadn't kept the plant open in bad times and thus kept the men working when she could always have closed it down.

18. The conclusion that Mrs. Mosesian sent a message to Ejadian that she would release those Union workers and get others was not based on a finding as no such finding was made. There is no

finding that "those Union workers" would be released as there was no testimony to that effect.

19. The statement on Line 6 of page 8, that Ekzoozian's testimony was extremely confused and contradictory as to details, is not substantiated by the record.

20. The statement on line 20, page 8, that the credible evidence does not establish that there were no rules and regulations which prohibit smoking throughout the warehouse, is immaterial and ambiguous. The offices were in the warehouse; it was never alleged that smoking was prohibited in the offices. The statement merely knocks down a straw man and presents an erroneous inference.

21. The finding on line 33 of page 8, that Justice admitted that the Mosesians had never informed him that there was any rule against smoking, is not substantiated by the evidence. He stated that he did not know of a rule applying to the entire establishment but he did not testify that the Mosesians had never informed him of one.

22. The statement on line 36 of page 8, that there were only a small number of "No Smoking" signs approximately one inch (1")) high, stencilled on the concrete pillars, presents an inference that is contrary to the evidence; whereas the evidence shows that the letters were one inch (1") high but that the entire sign was approximately 12"x6", the evidence being a visit to the warehouse.

23. The statement or rather "allegation," on line 43 of page 8, referring to an alleged interview

of Louise by a "field examiner," is not based on any evidence. This "field examiner's" report was not admitted in evidence. The reference to the contents of this report which was not in evidence illustrates the prejudice and bias of the Trial Examiner.

24. The statement concerning Louise Mosesian's memory in regard to the stencilled signs is contrary to the evidence.

25. The statement on line 51 of page 8, that Ejadian stated that there were never any "No Smoking" signs, other than the stencilled ones, in the warehouse until June 27, 1949, is not substantiated by the testimony. Any evidence on this point was admitted over strenuous objection by Respondent that Ejadian had no independent recollection. The affidavit which the attorney for the general counsel read to Ejadian did not refresh his memory and could not be used as evidence as it was never submitted as past recollection recorded.

26. The finding on line 60 of page 8, that the only "No Smoking" signs on the premises were the "ancient" stencilled signs, is contrary to the evidence.

27. The conclusion on line 63 of page 8, that it was clearly established that such signs were wholly ignored and that occasional cautions or reprimands by the Mosesians were shrugged off or disobeyed, is immaterial to the issue of the motive for the discharge and is not supported by the evidence and is contrary to the evidence, and Respondent reiterates and realleges and incorporates by reference

herein all exceptions heretofore made to findings of fact upon which such conclusions are based and said conclusions are improper on the basis of the facts found.

28. The findings in the first paragraph of page 9, that the Mosesians' and Ekzoozian's testimony that Justice's pipe and cigar were unlit when he was in the warehouse is not credited in view of Justice's testimony, as well as that of Krikorian and Machoian, is immaterial, misleading and not substantiated by the evidence. The evidence does not indicate any conflict in the testimony as to any single occurrence. It was testified by Justice that sometimes he smokes but most of the time the pipe or cigar was unlit. Ekzoozian and the Mosesians testified that they never saw Justice smoking. There was no inconsistency in testimony as to any one particular incident. Therefore, the testimony of Ekzoozian and the Mosesians cannot be discredited. It must stand for the fact that they never saw Justice smoking in the warehouse and, therefore, did not believe that he smoked contrary to the rules.

29. The finding in line 16 of page 9 that the testimony of Krikorian rebuts and impeaches the testimony of the Mosesians and Ekzoozian, that there was no recognized or enforced rule against smoking, is contrary to the testimony of Krikorian.

30. The finding on line 16 of page 9, that the testimony of Justice rebuts and impeaches the testimony of the Mosesians and Ekzoozian, is not substantiated by the evidence.

31. The finding on line 18 of page 9, that Eja-dian testified that the first cardboard signs were put up two and one-half ($2\frac{1}{2}$) months after Machoian's employment, is contrary to his testimony.

32. The finding on line 22 of page 9, that the Mosesians insisted that the signs had been in the warehouse through the period of Machoian's employment, is contrary to the testimony and infers that the Mosesians insisted that all cardboard signs were up during that period, which inference is contrary to the testimony.

33. The conclusion on line 24 of page 9, that Respondent's defense was a synthetic one, is contrary to the evidence, and Respondent reiterates and realleges and incorporates by reference herein all exceptions heretofore made to findings of fact upon which said conclusions are based and said conclusions are improper on the basis of the facts found.

34. The finding on line 30 of page 9, that Mrs. Mosesian failed to assign a reason for Machoian's discharge, is contrary to the evidence.

35. The finding on line 33 of page 9, that she did not catch Machoian smoking twice on the same day of his discharge and had not threatened to discharge him, is contrary to the evidence.

36. It was found or stated on line 38 of page 9, that Misakian testified that after discharging Machoian, "Mrs. Mosesian said only that she 'told him not to come back to work any more'," whereas

Misakian testified that Mrs. Mosesian said that she "told him not to come back to work any more." Misakian did not testify that this was the only thing Mrs. Mosesian said. Misakian testified further that she hadn't been paying much attention.

37. The conclusion on line 40 of page 9, that Mrs. Mosesian said only "don't come back to work tomorrow," is contrary to the evidence and based on hearsay related by the complaining witness and, as such, cannot sustain a finding of fact or conclusion.

38. It is stated on line 40 of page 9 that Ekzoozian testified that Machoian, immediately after his being discharged, told Ekzoozian that Mrs. Mosesian "had told him only 'don't come down to work tomorrow'," whereas the testimony and evidence is that Machoian told Ekzoozian that Mrs. Mosesian had said "don't come down to work tomorrow." Ekzoozian did not testify that Machoian told him that Mrs. Mosesian had only said "don't come down to work tomorrow."

39. The finding on line 46 of page 9, that there was no rule against smoking in all points throughout the warehouse, is immaterial and irrelevant as it was never alleged that smoking was prohibited in the offices which are in the warehouse, and certainly Machoian knew he was not to smoke where he was working, having been warned twice in the same day.

40. The conclusion on line 49 of page 9, that it is inconceivable that there could have been a rule, as contended, against smoking, without Justice having been aware of it, is improper upon the basis of the facts found and of the testimony in the record.

41. The finding on line 50 of page 9, that there were only occasional cautions, is misleading and contrary to the evidence, which evidence, including the testimony of Krikorian, proved that cautions were given on every occasion possible.

42. The finding on line 51 of page 9, that any cautions were, at most, directed at preventing or minimizing smoking in sections of the warehouse where inflammable material was stored, is contrary to the evidence. The "at most" is an innuendo, contrary to the evidence, including Krikorian's testimony.

43. The finding in the first paragraph on page 10, that "in no instance was any employee warned or threatened with disciplinary action and certainly not with lay-off or discharge," is contrary to the evidence. The Trial Examiner did not believe the corroboration of six witnesses to other facts, why would he believe any corroboration of this fact.

44. The finding on line 13 of page 10, that Mrs. Mosesian smoked in the warehouse is not supported by the evidence.

45. The conclusion on line 18 of page 10, that there was no legitimate basis for suddenly discharging Machoian is not supported by the evidence and

is contrary to the evidence, and Respondent reiterates and realleges and incorporates by reference herein all exceptions heretofore made to findings of fact upon which said conclusion is based and said conclusion is improper on the basis of the facts found.

46. The statement on line 22 of page 10, that the "belated pleadings at the hearing of additional reasons for the discharge also cast a dubious shadow upon the bona fides of Respondent's original defense," is not based on any evidence or testimony as the pleadings were not introduced as evidence and could not be so introduced. There is not one iota of testimony on the part of Mrs. Mosesian which is shifting as to the reason for discharge. In fact, each and every Mosesian testified that Machoian was discharged because Mrs. Mosesian caught him smoking for the second time in one day. There was no shifting of reasons here. The purpose of the hearing was to determine the motive for the discharge of Machoian. If counsel for Respondent, during the course of the testimony, feels that there is evidence for cumulative causes indicative of the low regard of the employee in the eyes of the employer (whose motives are up for determination) it is counsel's duty to bring them out. It is inconceivable that such could cast a shadow on the bona fides of Respondent's defense. On the contrary, it is essential to place the employee in the setting as seen by the employer on the day of his discharge.

47. The findings in lines 33 to 58 of page 10 are excepted to as they indicate a complete incomprehension of the issues involved in the determination of the motive for a person's actions.

48. The "allegations" in line 43 of page 10, that Louise Mosesian had given a prior affidavit to a field examiner is another reference to the contents of an alleged affidavit not in evidence. This use of material not in evidence is prejudicial. It is a clear indication of the bias of the Trial Examiner.

49. The conclusion on line 1 of page 11 is contrary to the evidence. The Trial Examiner permitted the pleading of the additional defenses and he now uses that fact as evidence against Respondent. This is contrary to every known concept of evidence in the American judicial system.

50. The conclusion on line 5 of page 11 is contrary to the evidence and Respondent reiterates and realleges and incorporates by reference herein all exceptions heretofor made to findings of fact upon which said conclusion is based and said conclusion is improper on the basis of the facts found.

51. The innuendo on line 10 of page 11, that the Respondent gave no reason or gave a shifting and implausible reason has no basis in the evidence.

52. The findings reiterated on line 16 of page 11, that no cause was assigned for the discharge, is contrary to the evidence.

53. The finding on line 19 of page 11, that Respondent used a "series of shifting and implausible

reasons'' to explain Machoian's discharge, is so contrary to the evidence that it indicates gross prejudice.

54. The conclusion on line 21 of page 11, that such reasons point unmistakably to a discriminatory motive, is contrary to the evidence, and Respondent reiterates and realleges and incorporates by reference herin all exceptions heretofore made to findings of fact upon which said conclusion is based and said conclusion is improper on the basis of the facts found.

55. The N.L.R.B. decisions cited on page 11, lines 24 to 37, are irrelevant and have no fact similarity with the evidence in this case as none of them are decided upon facts where the dischargee was working in a warehouse and was reprimanded in the morning for smoking and warned and caught smoking that very afternoon and later failed to come to the office when directed.

56. The conclusion on line 49 of page 11, that there is affirmative evidence that Machoian was discharged because of Union membership and activities, is contrary to the evidence.

57. The finding on line 44 of page 11, that Machoian took "the lead" in the discussions and concerted activities which led to the formation of the Union, is contrary to the evidence and is not substantiated even by Machoian's testimony.

58. The finding on line 43 of page 11, which infers that. prior to Machoian's discharge, the

Mosesians were aware of the alleged Union activities of Machoian, is contrary to the evidence.

59. The finding on line 45 of page 11, that Sohigian testified that he definitely discussed Machoian's Union activities prior to Machoian's discharge, is not supported by Sohigian's testimony.

60. The findings on lines 47 to 50 of page 11 are not supported by the evidence.

61. The "conclusions" on lines 50 to 57 on page 11 are so unsupported by any findings of fact or evidence that they must be classified as mere allegations which indicate the Trial Examiner's prejudice.

62. The "conclusions" on line 58 on page 11 through line 4 on page 12 is so obviously contrary to the evidence that it constitutes a gross distortion of the record.

63. The finding or the statement on line 4 of page 12, that Respondent discharged the leader in the Union activities, is a blantant unsupported finding so contrary to the evidence that the very existence of a statement in this Intermediate Report discloses prejudice.

64. The reiteration on line 5 of page 12, that Respondent set forth a series of shifting and impulsive reasons, is again contrary to the evidence and indicates a wilful disregard of the issues in this case.

65. The conclusion in the paragraph beginning on line 7 of page 12, that “on the basis of all the evidence that Respondent, on April 12, 1949, discharged Machoian because of Union membership and activities * * *,” is not supported by the evidence and is contrary to the evidence, and Respondent reiterates and realleges and incorporates by reference herein all exceptions heretofore made to findings of fact upon which said conclusion is based and said conclusion is improper on the basis of the facts found.

66. The finding in the paragraph beginning with line 6 on page 12 made “on the basis of all the evidence” cannot support the conclusion that Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(3) of the Act as a finding on “all” evidence, is not sufficient under Section 10(c) of the Act to find unfair labor practices.

67. The conclusion on line 16 of page 12, that Respondent engaged in unfair labor practices within Section 8(a)(1) of the Act, is not supported by the necessary findings on the preponderance of the evidence as required by Section 10(c).

68. Upon the close of the case for the general counsel, Respondent moved to dismiss the complaint on the ground of the insufficiency of the evidence to prove any or all of the charges brought against Respondent. The Trial Examiner thereupon denied said motion, to which adverse ruling of the Trial Examiner the Respondent was entitled to an automatic exception, to which they still except.

69. The suggested remedy in the paragraph beginning on line 35 of page 12 is based upon findings of fact and conclusions which are not supported by and are contrary to the evidence as stated herein in the specific exceptions to the "findings of fact" of the Intermediate Report and Respondent, in support of its exception to said recommendation repeats, realleges and incorporates by reference said specific exceptions, including that taken on the ground that the findings do not sustain the conclusion.

Exceptions to Conclusions of Law

1. The conclusion in paragraph 2 of the "Conclusions of Law" subject to the exceptions of the Findings of Fact taken herein, are not supported by the evidence and are contrary to the evidence, and Respondent reiterates and realleges and incorporates by reference herein all exceptions heretofore made to findings of fact upon which said conclusions are based and said conclusions are improper on the basis of the facts found.

2. The conclusion in paragraph 3 of the "Conclusions of Law," subject to the exceptions of the Findings of Fact taken herein, are not supported by the evidence and are contrary to the evidence, and Respondent reiterates and realleges and incorporates by reference herein all exceptions heretofore made to findings of fact upon which said conclusions are based and said conclusions are improper on the basis of the facts found.

3. The conclusion in paragraph 4 of the "Conclusions of Law," subject to the exceptions of the Findings of Fact taken herein, are not supported by the evidence and are contrary to the evidence, and Respondent reiterates and realleges and incorporates by reference herein all exceptions heretofore made to findings of fact upon which said conclusions are based and said conclusions are improper on the basis of the facts found.

Exceptions to the Recommended Order

1. The recommendations in paragraph 1(a), (b) and (c) and 2(a), (b) and (c) are based upon findings of fact and conclusions which are not supported by, and are contrary to the evidence as stated herein in the specific exceptions to the "Findings of Fact" of the Intermediate Report and Respondent, in support of its exception to said recommendations, repeats, realleges and incorporates by reference said specific exceptions, including that taken on the ground that findings do not sustain the conclusion.

2. The recommendation in paragraph 2(b) is unnecessary and unreasonable at the present time. Following an election held by the N.L.R.B., the local Union No. 431 was certified and is now the bargaining representative of the employees of the Respondent warehouse. The employees are all organized and represented by the Union of their choice. In these circumstances, no useful purpose would be served by the posting of these signs. In fact, it might be injurious to the present peaceful employee-employer relationship.

And for General Exceptions, Respondent States:

This report should be disregarded on the following grounds:

(a) The Trial Examiner bases his findings on matters not in evidence which is directly contrary to the requirements of 10(b) of the Act.

(b) He deliberately misquotes testimony of the witnesses.

(c) He ignores testimony favorable to Respondent even when given by those he claims to credit.

(d) He finds bias for all those persons whose testimony is favorable to Respondent without giving like credence to the bias of the complaining witnesses, and further attacks the credibility of witnesses for Respondent on a basis that does not exist in the record.

(e) He credits everything unfavorable, even when testified to by his so-called discredited witnesses.

(f) He draws conclusions contrary to common sense. How can one operate a warehouse full of inflammables and yet permit smoking in the area where the goods are stored?

(g) He requires corroboration of the uncontradicted and unimpeached testimony of Mary Mosesian that they had previously discharged a man for smoking. Yet Machoian, who was, in numerous instances, proved to lie, is credited without corroboration.

(h) He discredits Ekzoozian because of his social relationship with the Mosesians. Whereas, the

testimony is clear that there was a much stronger social relationship with Machoian.

(i) His report is inconsistent with his own statements of evidence, as set forth in the transcript, derived from his visit of the premises.

(j) His report is replete with misquotations of testimony, twisting of the evidence, unsubstantiated innuendos and inferences, inconsistent findings and refusal to follow the rules of evidence.

Wherefore, Respondent respectfully prays that the complaint against it be dismissed and for such other and future relief as may be just and proper.

Dated: Fresno, California, May 23, 1950.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

/s/ HOWARD B. THOMAS,
Attorneys for Respondent.

To: National Labor Relations Board,
Washington, D. C.

Received May 26, 1950.

United States of America
Before the National Labor Relations Board
Case No. 20-CA-228

In the Matter of

STATE CENTER WAREHOUSE & COLD
STORAGE COMPANY,

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, Local 431, AFL.

DECISION AND ORDER

On May 8, 1950, Trial Examiner George A. Downing issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices as alleged in the complaint, and recommended that these particular allegations in the complaint be dismissed.¹ Thereafter, the Respondent filed exceptions to the Inter-

¹No exceptions were filed to so much of the Intermediate Report as recommends that certain allegations in the complaint be dismissed. Accordingly, we shall adopt such recommendations without passing upon the issues involved.

mediate Report and a supporting brief.

The Board² has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings,³ conclusions, and recommenda-

²Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

³The Intermediate Report contains certain misstatements of fact and inadvertences, none of which affects the Trial Examiner's ultimate conclusions, or our concurrence in such conclusions. Accordingly, we make the following corrections: (1) Neither Krikorian nor Justice testified about the cardboard "no smoking" signs. The Trial Examiner found that they testified that there were no cardboard "no smoking" signs; (2) the Trial Examiner found that Ejadian testified that there were no "no smoking" signs, other than stencilled ones, in the warehouse prior to June 27, 1949; Ejadian testified that there were no "no smoking" signs there prior to that time; (3) in describing the incident between Ekzoozian and Machoian, the Trial Examiner referred to statements made to Machoian by Sohigian; the statements were made by Ekzoozian instead of Sohigian; (4) at footnote 3 of the Intermediate Report the Trial Examiner implies that the Respondent's defense as to the discharge of Machoian was preconceived. Elsewhere the Trial Examiner suggests that it was an afterthought. As we agree with the Trial Examiner that Machoian was not in fact discharged for violating a "no smoking" rule it becomes unnecessary to reconcile this apparent inconsistency.

tions of the Trial Examiner with the following additions and modifications:

1. We agree with the Trial Examiner and find that the Respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act by the coercive statements and conduct of Louise Mosesian and Twodi Mosesian, involving interrogation as to union activities and threats to close the warehouse, as set forth in the Intermediate Report.

2. We also find, as did the Trial Examiner, that the Respondent discriminatorily discharged Moses Machoian in violation of Section 8 (a) (3) of the Act. However, in this connection the evidence does not sustain, and we do not adopt, the following findings by the Trial Examiner: (1) That Machoian was the first employee to become interested in the Union and was the leader of the union activities in the warehouse; and (2) that the Respondent had no rule against smoking in the warehouse.

The anti-union animus of the Respondent's officials is demonstrated in the threats and union interrogation we have found violative of Section 8 (a) (1). Moreover, the credited testimony of Krikorian and Sohigian⁴ established that the Respondent's officials believed that Machoian was responsible for bringing the Union into the warehouse. The Re-

⁴We do not rely upon matters set forth in Sohigian's prior statement used by the General Counsel to refresh Sohigian's recollection.

spondent's defense that it discharged Machoian for violating a long standing rule against smoking in the warehouse is most unpersuasive. Even if we, unlike the Trial Examiner, were to accept the testimony of Mary Mosesian that the Respondent had at some unspecified time once discharged an employee for such an infraction, the vast preponderance of the credited testimony clearly establishes that at least during the period of Machoian's employment the "no smoking" rule was rarely enforced, and when enforced brought forth no more than an admonition not to smoke. Machoian was never warned that smoking in the warehouse would result in his discharge, and he was not told at the time of his discharge that such was the reason for his discharge. In these circumstances we are satisfied that Machoian was not discharged for violating a "no smoking" rule but rather for his union activities.

The Remedy

As Machoian decided, on or about January 24, 1950, not to return to his former employment we shall not order the Respondent to reinstate Machoian. We shall, however, order the Respondent to make Machoian whole for any loss of pay from the date of his discharge to January 24, 1950. Since the issuance of the Trial Examiner's Intermediate Report, however, the Board has adopted a method of computing back pay different from that prescribed by the Trial Examiner.⁵ Consistent with

⁵F. W. Woolworth Company, 90 NLRB No. 41.

this new policy, we shall order that the loss of pay be computed on the basis of each separate calendar quarter or portion thereof during the period from the Respondent's discriminatory action to January 24, 1950. The quarterly periods, hereinafter called "quarters," shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which Machoian would normally have earned for each quarter or portion thereof, his net earnings,⁶ if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter.

We shall also order the Respondent to make available to the Board, upon request, payroll and other records to facilitate the checking of the amount of back pay.⁷

⁶By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere, which would not have been incurred but for this unlawful discrimination, and the consequent necessity of his seeking employment elsewhere. *Crossett Lumber Company*, 8 NLRB 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered earnings. *Republic Steel Corporation v. NLRB* 311, U.S. 7.

⁷*F. W. Woolworth Company*, *supra*.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that State Center Warehouse & Cold Storage Company, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, AFL, or in any other labor organization of its employees, by discriminatorily discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment;

(b) Interrogating its employees concerning their union membership or activities or as to voting in the election; threatening its employees with ascertaining who are union members; threatening to close or rent the warehouse because of union activities; threatening replacement of its employees if they join the Union; or in any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, AFL, or any other labor organization, to bargain collectively through representatives of their own

choosing, to engage in concerted activities for the purpose of collective bargaining, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole Moses Machoian in the manner set forth in the section entitled "The Remedy" for any loss of pay he may have suffered from the date of the Respondent's discriminatory discharge to January 24, 1950;

(b) Upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due and the right of reinstatement under the terms of this Order;

(c) Post at its warehouse in Fresno, California, copies of the notice attached hereto and marked Appendix A.⁸ Copies of said notice to be furnished by the Regional Director for the Twentieth Region, after being signed by a representative of the Re-

⁸In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "Decisions and Order," the words "Decree of the United States Court of Appeals Enforcing."

spondent, shall be posted by the Respondent, immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

It Is Further Ordered that the complaint be, and it hereby is, dismissed insofar as it alleges that the Respondent violated Section 8 (a) (1) of the Act by promising extra employment benefits to its employees if they voted against the Union, and by terminating extra employment benefits of its employees because of their union activities.

Signed at Washington, D. C., this 24th day of August, 1950.

PAUL E. HERZOG,
Chairman.

JOHN M. HOUSTON,
Member.

PAUL L. STYLES,
Member.

[Seal]

NATIONAL LABOR
RELATIONS BOARD.

Appendix A

Notice to All Employees
Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the **National Labor Relations Act**, as amended, we hereby notify our employees that:

We Will Not discourage membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, AFL, or any other labor organization of our employees, by discriminatorily discharging or refusing to reinstate any of our employees, or discriminate in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

We Will Not interrogate our employees concerning their union membership or activities or as to voting in the election; we will not threaten to ascertain who are members of the union; we will not threaten to close or rent the warehouse because of union activities, nor threaten to replace our present employees if they join the union.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 431, AFL, or any other labor organization, to bargain collectively in concerted activities for the purposes of collective bar-

gaining or other mutual aid or protection, or refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

We Will Make whole Moses Machoian, for any loss of pay suffered as a result of the discrimination against him.

All our employees are free to become, remain or refrain from becoming or remaining members of said union or any other labor organization except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act. We will not discriminate in regard to hire, tenure of employment, or any other term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

STATE CENTER

WAREHOUSE & COLD

STORAGE COMPANY,

(Employer)

By

(Representative)

(Title)

Dated:

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Before the National Labor Relations Board
Twentieth Region
Case No. 20-CA-228

In the Matter of:

STATE CENTER WAREHOUSE & COLD
STORAGE COMPANY,

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, Local No. 431

Tuesday, February 14, 1950

Pursuant to notice, the above-entitled matter came
on for hearing at 10:30 a.m.

Before: George A. Downing,
Trial Examiner.

Appearances:

HARRY BAMFORD, ESQ.,
ROCCO C. SICILIANO, ESQ.,

821 Market Street,
San Francisco, California,

Appearing on Behalf of the General
Counsel.

HOWARD B. THOMAS, ESQ.,
WILLIAM N. SNELL, ESQ.,
KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

1001 Helm Building,
Fresno, California,

Appearing on Behalf of the State Cen-
ter Warehouse & Cold Storage Com-
pany, the Respondent.

PROCEEDINGS

* * *

Mr. Bamford: Also I believe that the Respondent is ready to stipulate that the employer is engaged in commerce within the meaning of the Act.

Trial Examiner Downing: You will so stipulate?

Mr. Thomas: I will so stipulate.

Trial Examiner Downing: The stipulation will be received.

Mr. Bamford: Parenthetically, the events to be described in this proceeding occurred in the first part of 1949. For background purposes and to fix the dates for certain of these events, the following stipulation is proposed:

On March 18, 1949, Local 431, International Brotherhood [11*] of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L., were certified by the National Labor Relations Board as the collective bargaining representative for all warehousemen and truck drivers employed by the State Center Warehouse and Cold Storage Company.

The petition in this case, 20-CA-482, was filed February 8, 1949, and the Company was notified of the filing of this petition by a letter from the Twentieth Region, NLRB, dated February 10, 1949. The election was held March 10, 1949.

Trial Examiner Downing: Is that stipulation acceptable?

Mr. Thomas: So stipulated, your Honor.

Trial Examiner Downing: It will be received.

* Page numbering appearing at top of page of original Reporter's Transcript.

MOSES MACHOIAN

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Siciliano:

Q. Did you ever, while working there, become interested in a Union? A. I didn't catch you.

Q. When you were working there, did you ever become interested in joining a Union?

A. Yes, sir.

Q. What union was that? A. A.F.L.

Q. A.F. of L. what? A. 431, No. 431.

Q. Of which union was it? A.F. of L. what? [14]

A. A.F. of L.

Q. Do you know the name of the union?

A. Well, Warehouse Union.

Q. The Warehouse Union? The Teamsters and Warehouse Union?

A. Yes. They got the number, 431.

Q. What did you do? How did you join the Union? A. We talked to each other. [15]

* * *

Q. Did your employers say anything to you about the Union?

A. No, they didn't say nothing about it. We didn't talk about it, because they told us, "Don't talk about it in there at all."

(Testimony of Moses Machoian.)

Trial Examiner Downing: Who said not to talk about it?

The Witness: The Union.

Q. (By Mr. Siciliano): The Union told you not to talk about your signing the paper?

A. Yes, as long as we signed the paper, wait until the [23] time.

Q. So then what happened? Did anything happen?

A. Well, after six weeks, I guess, the Mosesians got a letter from the Union that the people wants a union over there and we are going to come over and work for the Unions.

Q. The Mosesians got a letter, you say?

A. Yes.

Q. From the Union, you say? A. Yes.

Q. And then was anything said to you?

A. Well, when they got the letter, Louise came in the car and——

Q. Wait a minute. Louise came in to what car?

A. Box car. We were unloading the car.

Q. Who is "we"? A. Louise Mosesian.

Mr. Thomas: Your Honor, it hasn't been brought out how Mr. Machoian knew that the Mosesians got the letter.

Mr. Siciliano: I am coming to that.

Mr. Thomas: Will you bring that up first?

Q. (By Mr. Siciliano): How do you know that the Mosesians got a letter?

A. She told us in the car. Louise told us in the car.

(Testimony of Moses Machoian.)

Q. What did she say?

Mr. Thomas: If your Honor please, will you please state [24] the time, and who was present?

Mr. Siciliano: I was going to do that.

Q. Now tell us who was present in the car.

A. Eddie Ejadian, Harry Ekzoozian, and Bob Krikorian, and Bill Eccles.

Q. And yourself? A. Myself, yes.

Q. Louise came into the car, and what did she say?

A. She says, "Listen, fellows, did you sign any paper? Did you go over to the Union and sign a paper? Did Mr. Justice give you a paper to sign? Is anybody coming in here and make you sign the papers?" We all said, "No." "We didn't sign no papers, and nobody made us sign a paper at all."

Trial Examiner Downing: Will you fix the date of that, Counsel?

Q. (By Mr. Siciliano): When was this?

A. That was about the first of March.

Q. About the first of March?

A. I don't remember.

Q. You can't remember the exact time?

A. I don't remember the exact time.

Q. So you said what to Louise, when she asked you all these questions?

A. We were all in the car.

Q. How did she ask them? To all of you as a group? [25]

A. To all of us, all the group.

Trial Examiner Downing: Which one of you answered?

(Testimony of Moses Machoian.)

The Witness: We all answered. We said, "No. We didn't sign any paper and nobody made us sign any paper at all."

Q. (By Mr. Siciliano): Now I want to try to get, Mr. Machoian, the time down a little better. You say that you signed the application that I showed you a few minutes ago some time in January.

Mr. Thomas: If your Honor please, the application speaks for itself. It is dated.

Mr. Siciliano: Well, his memory is some time in January.

Trial Examiner Downing: His testimony was some time in January.

Q. (By Mr. Siciliano): You say that you signed the application some time in January?

A. I don't remember exactly the date, but the 18th, 19th, 17th. I don't know.

Q. All right. And then you worked a few more weeks? How long was it exactly, do you remember, when Louise came into the car?

A. About six weeks, I think about six, seven weeks.

Q. Do you remember when the election was?

A. March 10th, I guess.

Q. Did you vote in that election?

A. Yes, sir. [26]

Q. I want to go back to the time when you were in the car with Louise. A. Yes.

Q. When she asked you whether you had done anything about the Union, whether you had signed,

(Testimony of Moses Machoian.)

did Louise leave the car after she asked you these questions?

A. No. She says, "If you fellows vote for the Union, well, you know what is going to happen. We don't want Unions in this."

Q. Was there anything more she said in the car?

A. Anything more?

Q. Yes. A. Well she told us, everybody.

Q. Then, when she was finished, did she leave?

A. She says she is going over to the Union and find out.

Trial Examiner Downing: How long before the election was it that she was in the car?

The Witness: About ten or fifteen days, I think.

Q. (By Mr. Siciliano): And you say the election was March 10th? A. Yes.

Q. And she came into the car about ten or fifteen days before March 10th?

A. Yes, about ten days before, ten or fifteen days. I don't remember.

Q. Did you ever see Louise again before the election? [27]

A. Yes. After three days, after the thing happened, she came.

Q. After three days after what? After three days after this first time in the box car?

A. Yes.

Q. And then what?

A. And then she came over and she said, "Mose"—

(Testimony of Moses Machoian.)

Mr. Thomas: Wait a minute. Where did she come? Who was present?

Mr. Siciliano: I will bring that out.

Q. Who was in the car?

A. I was in the car, Bob was in the car, Eddie was in the car.

Q. Give their last names.

A. Eddie Ejadian, Bob Krikorian, Harry Ek-zoozian, and me, Moses Machoian.

Q. She came back to the car again three days later?

A. Three days later.

Q. What happened then?

A. She came over there and she said, "Listen, Mose, you are the guy that makes these people union. You organized the Union here, because Mr. Sohigian was"—

Q. Who is Mr. Sohigian?

A. I was working for him about a year ago.

Mr. Thomas: If your Honor please, let him complete the [28] conversation.

Q. (By Mr. Siciliano): Go ahead.

A. "We asked Mr. Sohigian, and Mr. Sohigian said you do the same thing over his place, you organized the Union over there, and you give all the people's name, and you are the one who organized here. We are sure you are the one."

Trial Examiner Downing: Did you admit it?

Q. (By Mr. Siciliano): What did you say then?

A. I said, "Yes, I do over there, but I know nothing about it over here," I said.

Q. What else was said? A. She left.

(Testimony of Moses Machoian.)

Q. She left the car? A. Yes.

Trial Examiner Downing: How long was that after the first time she was in the car?

The Witness: That was the second time she come over.

Trial Examiner Downing: I say, how long after the first time was that?

The Witness: About three days after.

Trial Examiner Downing: All right. Proceed.

Q. (By Mr. Siciliano): She then left the car?

A. Yes.

Q. Did you do anything further?

A. Well, we had a regular argument. [29]

Q. Who is "we"? Who had an argument?

A. I had the argument.

Q. With whom?

A. With Harry Ekzoozian. I said, "You are the one that screwed me, because"—

Mr. Thomas: Your Honor, would counsel please clarify when this argument occurred?

Mr. Siciliano: This happened right after Louise left the car, that same day, three days later.

Mr. Thomas: Would you have the witness testify to that?

Mr. Siciliano: He has already testified.

Mr. Thomas: It wasn't clear to me.

Trial Examiner Downing: It wasn't clear to me, either.

Mr. Siciliano: We could have the record read, but I will ask you.

Q. You had this argument with Harry when?

(Testimony of Moses Machoian.)

A. Harry Ekzoozian.

Q. When? A. The same time.

Q. Same time as when?

A. When Louise left.

Q. What visit? A. The second visit.

Q. When Louise left the second visit, what happened?

A. I told Harry, "You are the one. You are the one that [30] knows I had been kicked out for Unions at Sohigian, and you squealed on me. You told the Mosesians I worked over there and I had the same case, I was kicked out for unions, and they went over there and find out at Mr. Sohigian's."

Q. And then what?

A. Then he said, "You can't call me a squealer. I am going right over to the office and tell them they are going to lay you off. The Union can't work any more over here."

Q. I am going right over to the office?

A. Yes.

Q. Then what?

A. Then he went over to the office and talked to Louise.

Q. He ran over to the office? A. Yes.

Mr. Thomas: Wait a minute. How does he know he ran?

Mr. Siciliano: Well, that is a conclusion. You can strike that.

Mr. Thomas: Strike that out. He doesn't know.

Trial Examiner Downing: Did you see where he went?

(Testimony of Moses Machoian.)

The Witness: Yes. He said he was going over to the office.

Trial Examiner Downing: But did you see where he went?

The Witness: He went over to the office.

Trial Examiner Downing: Did you see him go over there?

The Witness: Yes, and Bob saw him, too. [31]

Q. (By Mr. Siciliano): Did you see him go over to the office?

A. Yes, I saw him go over to the office.

Trial Examiner Downing: Don't tell us what somebody else saw. You tell us just what you know.

Q. (By Mr. Siciliano): Now, you had the election? A. Yes.

Q. Did you see the Mosesians, or talk with them after the election?

A. No. They never talked to me after the election at all, no.

Q. Nothing was said after the election?

A. No.

Q. Can you tell us how it came about that you were laid off? A. There was a pay day.

Q. What day was that? A. The 12th.

Q. That was a pay day? A. Tuesday, yes.

Q. Tuesday, April 12th, was pay day. Go ahead.

A. We all go over to the office pay day and get our pay.

Q. What time of the day was that?

(Testimony of Moses Machoian.)

A. Five o'clock.

Trial Examiner Downing: What day of the week?

The Witness: April 12th.

Trial Examiner Downing: What day of the week? [32]

The Witness: Tuesday.

Trial Examiner Downing: I just wanted to find out what pay day is around here.

Q. (By Mr. Siciliano): Tuesday, April 12th?

A. Yes.

Q. Is that the day—when do they pay you?

A. Every Wednesday.

Q. Every Wednesday?

A. I mean Tuesday.

Q. Every Tuesday?

A. Every Tuesday they pay.

Q. Now they pay you at five o'clock?

A. Yes.

Q. Is that when you get off work?

A. That is when we get off work.

Q. How are you paid?

A. They give me a check.

Q. Every week? Once a week?

A. Every week.

Q. Now, this day, Tuesday, April 12th, when you went there, will you tell us what happened, when you went to get your check?

A. I went over to the office and got my check and walked out on the platform. That platform is right near the office.

(Testimony of Moses Machoian.)

Mr. Thomas: Would counsel please clarify? Did he go to [33] the office and then walk out, or did he go to the platform?

Q. (By Mr. Ciciliano): You went to the office first?

A. I went to the office first.

Q. Got your check?

A. Got my check and then went out the door on the platform.

Trial Examiner Downing: Who gave you the check?

The Witness: Louise.

Q. (By Mr. Siciliano): Louise gave you the check? A. Yes.

Q. You walked out of the door on to the platform? Were you leaving work? Were you going home for the day?

A. Yes, after five o'clock. We work until five o'clock.

Q. Then what?

A. And the old woman was over there, when I got my check.

Q. Who is the old woman?

A. Tourvanda Mosesian.

Q. And what happened?

A. She came right back at me out of the door, out on the platform.

Q. She came out to where you were on the platform? A. Yes.

Q. And then what?

(Testimony of Moses Machoian.)

A. She says, "Wait a minute, Mose."

Q. "Wait a minute, Mose"?

A. Yes. [34]

Trial Examiner Downing: Don't repeat the answer, if his answers are clear. If it is a question of whether the reporter has got the answer, then it would be in order to repeat it.

Q. (By Mr. Siciliano): Go ahead.

A. She told me, "You are going to get laid off," and I asked her, "What is the matter? No work?" She said, "That is my business, and when we need you, we will call you back by telephone."

Q. Did she ever call you back? A. No.

Q. Did you ever go back? A. No.

Q. You had worked then two days that week?

A. Yes.

Q. Monday and Tuesday?

A. Yes, the last week.

Q. How did you get your check?

A. I got my check by mail.

Q. When? A. Monday, the next Monday.

Q. The next Monday?

A. The next Monday.

Q. She gave you no reasons for firing you?

A. No. She never told me a word. That is all she told me. [35]

Q. Mr. Machoian, did you ever smoke in the warehouse?

A. Well, we smoke on the——

Q. Wait a minute. Who is "we"?

A. All the people.

(Testimony of Moses Machoian.)

Mr. Thomas: Answer the question.

Q. (By Mr. Siciliano): Tell me their names. Who are they?

A. Eddie Ejadian.

Mr. Thomas: You asked a specific question, Counsel. Have the witness answer the question.

Trial Examiner Downing: You were asked if you smoked. That was the question.

The Witness: I smoked lots of times on the platform. Everybody smoked.

Mr. Thomas: Answer the question yes or no.

Q. (By Mr. Siciliano): Did you smoke?

A. Yes, sometimes.

Q. Where? A. On the platform.

Q. Did you ever smoke inside the warehouse?

A. Sometimes we smoked inside.

Trial Examiner Downing: The question is, did you smoke inside?

The Witness: Sometimes.

Q. (By Mr. Siciliano): O.K. I am talking about you, alone, nobody else, just you. [36]

A. Yes, sometimes I smoked inside.

Q. All right. Now, did you ever get any complaints, did anybody ever tell you, about your smoking?

A. Not a one of them. They didn't say any complaint. They didn't tell me nothing at all.

Trial Examiner Downing: Did you ever know about any rule against smoking?

The Witness: There is no rule at all. They didn't tell me.

(Testimony of Moses Machoian.)

Q. (By Mr. Siciliano): When you started to work, did they tell you anything?

A. No, they didn't tell me anything.

Mr. Thomas: Your Honor, who is "they"? Where did it occur? What happened?

Q. (By Mr. Siciliano): When you started to work, did the Mosesians or did Mr. Justice, either of those people, tell you about smoking?

A. No.

Trial Examiner Downing: Who hired you?

The Witness: The old woman hired me.

Q. (By Mr. Siciliano): Mrs.—

A. Mrs. Tourvanda.

Q. Did you ever see anyone else smoke?

A. The people all working over there.

Q. Tell me who? [37]

A. Eddie Ejadian, Bob Krikorian, Harry Ek-zoozian, and Eccles smoked sometimes.

Q. Eccles? A. Yes.

Trial Examiner Downing: Did Mr. Justice ever smoke?

The Witness: Yes.

Trial Examiner Downing: Where?

The Witness: In the warehouse.

Trial Examiner Downing: Did he ever smoke on the platform?

The Witness: He come over to the platform. He smoked on the platform. He smoked inside. He smoked everywhere.

* * *

Q. (By Mr. Siciliano): Did you ever see any "No Smoking" signs around?

(Testimony of Moses Machoian.)

A. No, never.

Q. You never saw any? A. No.

Q. Were any signs ever pointed out to you?

A. No.

Q. Did anybody ever point out some signs?

A. No. [38]

Q. Mr. Machoian, did you ever sing in the warehouse? A. Sometimes.

Trial Examiner Downing: What?

Mr. Siciliano: Sing.

Q. Did you ever sing? A. Sometimes.

Q. How loud? A. Well, not loud, anyway.

Trial Examiner Downing: The Answer doesn't say he was fired for singing, Mr. Siciliano.

Mr. Siciliano: All right, I am dropping that.

Q. Mr. Machoian, do you want your old job back? A. Not just now, no.

Q. Not just now?

A. No, because I bought a ranch three weeks ago and I can't go back over there any more, no.

Q. When did you decide that you don't want to go back?

A. Before three weeks, any time they give me a job, I go back.

Q. When you bought the ranch three weeks ago, that is when you decided? A. I can't go now.

Q. You can't go now? A. No. [39]

(Testimony of Moses Machoian.)

Cross-Examination

By Mr. Thomas:

Q. Where did you work before coming to the State Center Warehouse?

A. Before the warehouse?

Q. Yes. A. I worked Libby's.

Trial Examiner Downing: Where?

The Witness: Libby, McNeill & Libby in Selma.

Q. (By Mr. Thomas): Did you leave your employment there or were you discharged?

A. How is that?

Q. Did you leave your employment there or were you fired? A. No.

Mr. Siciliano: I object, your Honor; that is immaterial.

The Witness: I——

Trial Examiner Downing: Just a minute. Don't answer until I rule on the objection.

Mr. Thomas: In order to understand the charges that are made here, we have to place the witness in his employment, what he does, and the character of the employee. They have introduced evidence with regard to his employment at Mr. [41] Sohigian's place, and what occurred there. This Libby, McNeill & Libby employment came between his employment and the one at Mr. Sohigian's.

Trial Examiner Downing: Suppose it did?

Mr. Thomas: Then, if your Honor please, it is building up the character of your witness here, in order to present the witness that we have before us.

(Testimony of Moses Machoian.)

Trial Examiner Downing: Suppose he has been fired from Libby, McNeill & Libby?

Mr. Thomas: Suppose he has been fired from every place he has been?

Trial Examiner Downing: Well, suppose he has? The issue is that he was fired for smoking.

Mr. Thomas: And for union activities.

Trial Examiner Downing: The Complaint says it was for—the Answer says that he was fired for smoking.

Mr. Bamford: We are going to strenuously resist any attempt upon the part of the Respondent to enlarge his Answer with respect to the reasons for discharge.

Mr. Thomas: If your Honor please, on cross-examination they opened—I mean on direct examination, they opened the whole deal as to Mr. Machoian's singing.

Trial Examiner Downing: They asked if he sang, but——

Mr. Thomas: And they asked if he sang loudly.

Trial Examiner Downing: Up to this time the Respondent [42] has not pleaded that he was discharged for singing. It pleaded only that despite frequent warnings to desist, he was discharged for smoking while at work. That is what the Respondent has pleaded. I assume that is what it expects to prove.

Mr. Thomas: That is your immediate cause for discharge, your Honor.

Trial Examiner Downing: Now, if you expect

(Testimony of Moses Machoian.)

to prove that he was discharged from Libby, McNeill & Libby for smoking at work, that might possibly have some remote relevance.

Mr. Thomas: We are not going to prove that, your Honor, but what we have averred in our Answer is the immediate cause for his discharge.

Trial Examiner Downing: You have pleaded only one cause.

Mr. Thomas: That is right, and that is the immediate cause.

Trial Examiner Downing: All right.

Mr. Thomas: That doesn't mean that there isn't a cumulative effect here. You have to place your employee in the category in which he exists.

Trial Examiner Downing: As a smoker?

Mr. Thomas: Not only as a smoker, but as a smoker and as an employee of the State Center Warehouse.

Trial Examiner Downing: I understand that, but how does the [43] fact that he worked elsewhere and may have been discharged have any bearing on the issue here?

Mr. Snell: If your Honor please, the proof of these cases usually follows the pattern of proving that the employee was an inefficient employee.

Trial Examiner Downing: Inefficient?

Mr. Snell: That he was not an efficient employee, and that there was——

Trial Examiner Downing: You haven't alleged that he was inefficient. You have alleged that despite frequent warnings, he smoked while at work

(Testimony of Moses Machoian.)

and that you discharged him for that.

Mr. Thomas: That was the immediate cause for discharge, your Honor. If your Honor please, if there is any question, I would like to move at this time for leave to amend the Answer, to show that Mr. Machoian was also obnoxious in regard to his conduct in the plant.

Mr. Bamford: Mr. Examiner, in the first place it seems to me that it ill behooves the respondent to change his defense at this time. In the second place, if he moves to amend the Complaint, I shall strenuously resist that motion. [44]

Trial Examiner Downing: You mean the Answer.

Mr. Bamford: The Answer. The case is a year old and he has had plenty of time to do it. In the third place, if the Examiner grants the motion to amend the Answer, I would like at that time to have leave to have additional time in which to prepare rebuttal evidence. We have no evidence to show whether he sang or was discharged for singing, at this time.

Mr. Thomas: Your Honor, his singing is in all the affidavits that the Government took, and they brought it out at the time that——

Trial Examiner Downing: Of course, the affidavits that the Government took are not evidence before me in this case. This case will be heard on the testimony that is produced here, not on affidavits that the Government may have in its official file, its investigatory file.

Mr. Thomas: That is correct, Your Honor, but

(Testimony of Moses Machoian.)

the position that we are taking here is that Mr. Machoian's conduct throughout the plant certainly they should be aware of it, in view of the fact that they have it in their affidavits, and we are not springing any surprise on them.

Trial Examiner Downing: Are you prepared to state orally the amendment that you desire to offer?

Mr. Thomas: We will be very shortly, Your Honor. I would like to work it out in final form.

Trial Examiner Downing: You are not prepared to state it [45] orally at this time?

* * *

Trial Examiner Downing: Of course, it is up to you to plead what you want, but general inefficiency covers the waterfront, doesn't it?

Mr. Snell: Yes. it does, but in the case of any employee it is largely a matter of underlying causes and an ultimate cause, immediate cause.

* * *

Trial Examiner Downing: I suggest that for the present [47] you limit your examination to the issues in the Answer.

Mr. Thomas: Yes, Your Honor.

Trial Examiner Downing: As it stands at the present.

Q. (By Mr. Thomas): I am going to refresh your recollection. Where did you work before you came to work at the State Center Warehouse?

A. Libby, McNeill, Libby in Selma.

Q. When did you leave there?

A. About some time in August. I got hurt and

(Testimony of Moses Machoian.)

I went to the hospital, and then the season is finished and I got through with it.

Q. Why did you go to the hospital?

A. I had cut my finger.

A. At Libby's?

A. Libby, McNeill, Libby's, yes, sir.

Q. How long were you in the hospital?

A. I have been about 8 days in the hospital and——

Mr. Siciliano: Mr. Examiner, I object to this testimony as being immaterial at the present time. In the first place, we don't have the time when this man worked. August of what year?

Trial Examiner Downing: How is it material, Mr. Thomas?

Mr. Thomas: If Your Honor please, it would certainly seem to me, as I was discussing here a moment ago, that the type of employee that the man is is relevant. If you want to [48] skip all this and go directly to his employment at State Center, I will be glad to do so, but he came to the State Center Warehouse with an impairment. I think Your Honor should know that.

Mr. Bamford: Well, do you want to include that in your answer?

Trial Examiner Downing: How is that material? In view of the amendment that has been suggested here orally, I don't see how that is material.

Mr. Thomas: It will come out. We will develop later on, Your Honor, that there were certain complaints made against Mr. Machoian by other employees and that that finger had a very definite

(Testimony of Moses Machoian.)

point in the complaints that were made.

Trial Examiner Downing: Proceed with the examination. I will overrule the present objection.

Q. (By Mr. Thomas): Where did you work before that, Mr. Machoian? A. Where?

Q. Where did you work before you worked at Libby's?

A. Magarian's, Industrial Scientific Company.

Q. Who was your employer?

A. Magarian.

Q. Who was your immediate employer there?

A. What was that?

Q. Who was your immediate employer at Magarian's? Wasn't it [49] Mr. Sohigian?

A. Sohigian was the boss.

Q. You were discharged from Sohigian's place?

A. Yes, sir.

Q. Why were you discharged?

A. I got kicked out for the Unions, too.

Q. You were fired? A. Yes.

Q. You were fired because of union activities from Sohigian's?

A. Well, he didn't so so, but he come over and tell me——

Q. Wait a minute. Answer the question. Go ahead.

A. He came over and tell me, "Mose, we hear you are not satisfied with the pay. I think you get fired. You work until Friday and you can't work here no more."

Q. You are certain that that is what happened?

A. Well, I left the job.

(Testimony of Moses Machoian.)

Q. Isn't it true, Mr. Machoian, that you were fired because you were inefficient in your work, that you——

Mr. Bamford: Just a moment. I am going to object to any further line of questioning on this. Perhaps we have been overruled on this objection before, but the only reason we went into his former employment was because of a certain conversation had with Louise. It was merely background.

Trial Examiner Downing: The objection is [50] overruled. Proceed.

Q. (By Mr. Thomas): Isn't it true, Mr. Machoian, that you were fired by Mr. Sohigian because you were inefficient in your work, because you destroyed the material over there and broke the dies at the place?

A. No. He didn't tell me nothing. I asked him, "Aren't you satisfied that I work here?" And he said, "You are a good fellow, but you are not satisfied with the pay. We are going to kick you out." That is what Sohigian told me to my face.

* * *

Q. Is there anything in the warehouse that could catch fire?

A. I didn't see any fire over there.

Trial Examiner Downing: The question is, was there anything there that could catch fire.

The Witness: Yes.

Mr. Bamford: We will stipulate that it is a public warehouse and there are many things that would catch on fire.

(Testimony of Moses Machoian.)

The Witness: Naturally, if you throw matches, it would start a fire. [52]

Q. Together, yes. Who employed you when you first came to work at State Center?

A. Who hired me, you said?

Q. Yes. A. Mrs. Tourvanda Mosesian.

Q. When did you apply for the job?

A. I didn't get you.

Q. When did you first ask Mrs. Mosesian for the job?

A. A couple of days before I started.

Q. How did you happen to ask her?

A. Well, I asked her for a job, because the can-
nery was going to work a couple of weeks and I fin-
ish, and I try to [53] get the job, and she said,
"All right."

Q. Was there anyone else present at the time
when you went to ask her for the job?

A. Harry asked her for the job, too.

Q. Harry who? A. Harry, too.

Q. Harry who? A. Harry Ekzoozian.

Q. He went with you at the time? A. No.

Q. At the time you asked for the job?

A. Not at that time, no.

Q. You went alone?

A. No. You asked me who else asked for a job.
Harry asked the old woman for a job for me, and
then we went together and see the old woman, and
she said, "All right, come over and start Monday."

Q. You and Harry went to see Mrs. Mosesian for
the job? A. Yes.

(Testimony of Moses Machoian.)

Q. Harry was present? A. Yes.

Q. Was anyone else present?

A. My wife was present and his wife was present.

Q. Was anybody else present?

A. Louise was present over there. [54]

Q. Was anybody else present?

A. I don't see anybody else.

Trial Examiner Downing: Where were you? In the office, when you asked for the job?

The Witness: No. We go over to the house.

Trial Examiner Downing: The house?

Q. (By Mr. Thomas): Where is Mr. Mosesian's house?

A. On "R" Street, but I don't know the number.

* * *

Q. (By Mr. Thomas): What was said at the time when you were employed? Did anybody talk to you about your employment? Who employed you? The old lady employed you? A. What?

Q. Mrs. Mosesian hired you? A. Yes.

Q. Did she say anything to you at the time that you were employed? A. No. At the time?

Q. About smoking?

Mr. Siciliano: We object to that. He is supposed to [55] follow the line of the direct examination on cross, and I am wondering what he is attempting to bring out here. We asked no questions in regard to his hiring.

Trial Examiner Downing: I will overrule the objection.

Mr. Thomas: What I am trying to do, Your Honor, is to get him put in the time and place and

(Testimony of Moses Machoian.)

location where he was employed and the conditions of his employment.

Trial Examiner Downing: All right, proceed.

Q. (By Mr. Thomas): Now, when Mrs. Mosesian hired you—— A. Yes.

Q. ——did she say anything about smoking in the warehouse? A. No.

Q. She didn't mention smoking in the warehouse?

A. She didn't mention nothing about me smoking at all.

Q. Nobody said anything about the smoking?

A. Nobody, since I worked over there. Nobody told me about the smoking at all.

Q. I am asking you about Mrs. Mosesian.

A. No.

Q. There was nothing said about smoking at that time? A. No, sir.

Q. Isn't it true that Mrs. Mosesian told you at that time that you could have the job but to remember that there would be no smoking in the warehouse, as the goods did not belong to them? [56]

A. No, sir.

Q. And if you wanted to smoke, you were to go outside on the platform?

A. She didn't tell me anything about the smoking at all, when she hired me, and she didn't tell me all the time I worked over there anything about the smoking, not one time.

* * *

Q. (By Mr. Thomas): Are there any "No

(Testimony of Moses Machoian.)

Smoking" signs in the warehouse?

A. No, sir. I don't see any signs at all.

Q. How long did you work there? You worked in the warehouse proper during all the time that you worked there at the Mosesian's?

A. About five or six months.

Q. Yes, and you worked in every part of the warehouse? A. Yes, sir.

Q. And you saw no "No Smoking" signs in that warehouse?

A. No, I didn't see any sign at all.

Q. Mr. Machoian, isn't it true that there are "No Smoking" signs stenciled on every pillar in that warehouse?

A. No, I don't see any sign at all.

Q. Isn't it true, Mr. Machoian, that there is a "No Smoking" [57] sign put right over the door as you go down into the basement?

A. No, I don't see any sign at all, no. At the time I worked over there I saw no sign at all, no.

* * *

Q. Did anyone warn you that you should not smoke in the [58] warehouse, after you had been hired?

A. No one told me anything since I worked out there.

Q. Nobody talked to you about smoking?

A. Not about the smoking at all.

Q. Isn't it true, Mr. Machoian, that you were warned many times during the period of your employment from November 18, 1948, to April 12, 1949, in the presence of Harry Ekzoozian by Mrs.

(Testimony of Moses Machoian.)

Mosesian to stop smoking in the warehouse and go outside, if you wanted to smoke?

A. Mrs. Tourvanda told me, you said?

Q. Yes. A. No.

Q. Isn't it true that you were warned many times during the period of your employment from November 18, 1948, to April 12, 1949, in the presence of Harry Ekzoozian by Louise Mosesian to stop smoking in the warehouse and to go outside?

A. They never told me, no.

Trial Examiner Downing: Mr. Thomas, in view of his categorical denials, is it necessary to continue that?

Mr. Thomas: Your Honor, what I wish to do is to have Mr. Machoian deny with regard to each one of these witnesses. I will produce the witnesses to show that each one of them warned him constantly not to smoke in the warehouse.

Trial Examiner Downing: Proceed.

Q. (By Mr. Thomas): Isn't it true that you were warned several [59] times during this period of your employment from November 18, 1948, to April 12, 1949, in the presence of Harry Ekzoozian by Mary Mosesian to stop smoking in the warehouse? A. No, sir.

Q. And to go outside, if you would want to smoke, where you would have to go?

A. No. I never heard anything from them at all.

Q. Isn't it true that you were told by Harry Ekzoozian, that you should not smoke in the warehouse or you would be fired?

(Testimony of Moses Machoian.)

A. That Harry told me, you said?

Q. Yes. A. No, no, sir.

Q. During the same period? A. No.

Q. During the same period of your employment?

A. No.

Trial Examiner Downing: Before you got a job there, did Harry ever tell you that there was any rule against smoking in the warehouse?

The Witness: No, sir; never.

Q. (By Mr. Thomas): Well, Mr. Machoian, you were fired on Tuesday, April 12, 1949. Who did you work with on that day? A. That day?

Q. Yes. [60]

A. I don't remember. We worked all together. I don't remember anyway.

Q. You don't remember what you were doing?

A. What?

Q. You don't remember what you were doing?

A. No.

Q. On that day?

A. No. That was a long time. I don't remember what we were doing that day.

Q. You don't recall that you were working with Harry Ekzoozian on that day?

A. Maybe I was working with Harry or some of those other people, but I don't remember.

Q. Were you warned on that day by anyone that you should not smoke in the warehouse?

A. No, sir.

Q. You had no conversations with anyone?

A. No. I didn't hear any time from anybody,

(Testimony of Moses Machoian.)

“Don’t smoke in the warehouse or outside,” or all that. I never hear.

Q. Isn’t it true, Mr. Machoian, that Mrs. Mosesian caught you smoking in the warehouse in the morning on that day and in the presence of Harry Ekzoozian warned you again that you must not smoke in the warehouse or you would have to go?

A. No, sir.

Q. Isn’t it true that Mrs. Mosesian caught you smoking again [61] in the afternoon of that day in the warehouse, while you were working with Harry Ekzoozian?

A. No, sir.

Q. Did anyone from the office catch you in the afternoon of that day, before you went for your check?

A. No.

Q. You talked to no one? A. No.

Q. Mrs. Mosesian did not send anyone to talk to you?

A. No.

Q. Mrs. Mosesian didn’t send anyone to tell you that she wanted to see you?

A. No.

Q. Mr. Machoian, isn’t it true that Violet Misi-kian came to you in the warehouse around 4:00 o’clock in the afternoon of April 12, 1949, and told you that Mrs. Mosesian wanted to see you after work, when you picked up your check?

A. No.

Q. Then, I take it that you didn’t go to see Mrs. Mosesian that afternoon?

A. No. They didn’t call me to the office and nobody told me a word about it, no.

Q. Did Mrs. Mosesian talk to you that afternoon?

(Testimony of Moses Machoian.)

A. No.

Q. Well, Mr. Machoian, you testified that she talked to you [62] at 5:00 o'clock on that afternoon.

A. Well, you just tell me when I go home after 5:00 o'clock, I go over there and I take my check, and she talk to me after.

Q. She did talk to you in the afternoon then?

A. After 5:00 o'clock.

Mr. Bamford: I think he misunderstood your question.

The Witness: Not in the office.

Q. (By Mr. Thomas): No. Where did she talk to you?

A. She talk to me outside on the platform, when I was going home. She said, "Mose, wait a minute." I said, "What is it?" She says, "You are going to laid off." I said, "Why? No work?" She says, "That is my business."

Q. Then she didn't tell you why you were fired?

A. No. She didn't tell me.

Q. There was no discussion with her of any nature whatsoever why you were fired?

A. No.

Q. Isn't it true that Mrs. Mosesian actually told you on the ramp in front of the warehouse on April 12, 1949, at or about the hour of 5:00 o'clock, that you were fired because of your smoking in the warehouse?

A. No, sir. She never talked a word about smoking at all.

Q. Mr. Machoian, did you have any idea as to

(Testimony of Moses Machoian.)

why you were fired? A. What was that? [63]

Q. Did you have any idea of why you were fired?

A. Why I was fired?

Q. Why you were fired?

Trial Examiner Downing: Did you have any idea why you were fired?

The Witness: I don't know, no.

Q. (By Mr. Thomas): You didn't have any belief as to why you were fired?

A. No.

Q. It came as a complete surprise to you?

A. No, I didn't hear nothing about I am going to get fired.

Trial Examiner Downing: Why did you think that you were being fired?

The Witness: I don't know. I never know I got fired that night.

Q. (By Mr. Thomas): You never had any belief as to why you were being fired?

Trial Examiner Downing: When you were fired, why did you think you were being fired?

The Witness: Well, I think they fire me because I work for the Unions.

Q. (By Mr. Thomas): She didn't tell you that?

A. No, she didn't tell me that. She didn't tell me that.

Q. That is the only belief, why you thought that you were fired? [64]

A. That is all I believed.

Q. Mrs. Mosesian didn't say anything as to that?

A. No. She just said, "Mose, you are going to

(Testimony of Moses Machoian.)

get laid off," and I said, "Why, no work?" And she says, "That is my business," and I said, "All right," and I go home. That was after 5:00 o'clock. I didn't know when I was going to get fired.

Q. Who drove home from work with you?

A. My daughter.

Q. Who? A. My daughter, my girl.

Q. Did anyone else?

A. Harry went with me every night.

Q. Harry drove home with you on that night?

A. Yes, sir.

Q. Isn't it true——

A. We always took him. [65]

* * *

Q. (By Mr. Thomas): Mr. Machoian, you have testified that Louise Mosesian talked to you twice in a boxcar? [66] A. Yes, sir.

Q. Shortly before the Union election?

A. Yes, sir.

Q. On the first occasion, you stated that Louise said she was going over to the Union to find out if you had joined the Union? A. Yes, sir.

Q. Was that a threat?

A. Well, I heard it. She said it.

Q. Pardon me?

A. She said she was going over to the Union and find out. Whether she go or not, I don't know.

Q. What did you consider her statement to mean?

Mr. Bamford: Objection.

(Testimony of Moses Machoian.)

Trial Examiner Downing: Sustained. The Board has passed on that point many times, Mr. Thomas. It isn't a question of whether the employee considers the inquiry coercion or not. It is what the reasonable effect might be, whether it would be reasonably calculated to have a coercive effect. The Board has found both before and after the Taft-Hartley Act, that the mere fact of inquiry into membership, Union membership, is coercive.

Q. (By Mr. Thomas): This inquiry was, according to you, directed to all the employees present? Look at me, Mr. Machoian, not at the Government Attorneys. [67]

Mr. Bamford: Let the record show that he wasn't looking at the Government Attorneys. He was looking over there.

Trial Examiner Downing: I don't know where he was looking.

Mr. Bamford: Well, I was looking at him. He wasn't looking at me.

The Witness: I don't get you. What do you mean?

Q. (By Mr. Thomas): I said, who was present at the time? Did Louise talk to you, when she——

A. Yes. Louise, when she come over, Bob Krikorian was over there, Harry Ekzoozian, Eddie Ejadian, and Bill Eccles.

Q. Did she talk to all of you together?

A. All of us together.

Q. She never talked to you or directed her inquiry to you alone?

(Testimony of Moses Machoian.)

A. Not the first time. She talked to us all together.

Q. When Louise talked to you again three days later, in the boxcar, was this the only time that any of the Mosesians talked to you about the Union or Union activities? A. That is all.

Q. Do you recall what time of the day it was when Louise talked to you?

A. It was about the last of February or the first of March, I think. I don't remember.

Q. No, Mr. Machoian, you misunderstood me. Do you recall [68] what time of day?

A. What time was it?

Q. What time of day?

A. It was about 10:00 o'clock.

Q. It was in the morning?

A. It was in the morning about 10:00 or half past 10:00.

Q. When she came out into the boxcar?

A. Yes.

Trial Examiner Downing: That was the first time?

The Witness: That was the first time, yes.

Q. (By Mr. Thomas): What time was it the second time she talked to you, at the time she mentioned Sohigian?

A. Well, let's see. It was in the afternoon, I guess. I don't remember.

Q. Perhaps I could refresh your recollection. Was it right after lunch?

A. I don't know. I don't remember if it was in the afternoon. I don't remember. It was a long

(Testimony of Moses Machoian.)

time ago. I don't remember what was the time she came over.

Q. It was during working hours, though?

A. Yes, during the working hours. It was in the boxcar.

Q. How did Louise happen to come up and talk to you?

A. She come over there. "Listen," she says, "Mose. Now, I believe you"——

Q. Listen, Mr. Machoian, you misunderstood my question. [69] Was there any occasion for her to come up to talk to you then?

A. Well, she came over there and tell me that.

Q. No. Were you then doing anything at the time to attract her attention?

A. She came over to see me, I guess, and she started talking to me.

Q. Listen to the question. Were you, Bob Krikorian, Harry Ekzoozian, and Bill doing anything to attract her attention?

A. Yes. We were unloading the flour.

Q. From the boxcars?

A. Yes, from the boxcar.

Q. Were you actually working at that time?

A. Yes.

Q. You were performing the duties that you were hired to do?

A. I didn't get you.

Trial Examiner Downing: Why don't you say, "Were you working"?

The Witness: Yes, we were working over there, when she came in.

(Testimony of Moses Machoian.)

Trial Examiner Downing: Phrase your questions as simply as possible, Mr. Thomas.

Mr. Thomas: I am awfully sorry, Your Honor.

Q. Were you talking while you were working?

A. Sure. [70]

Q. Were you arguing while you were working?

Trial Examiner Downing: What time are you talking about?

Mr. Thomas: On this occasion.

Trial Examiner Downing: He is speaking generally, I am afraid.

Mr. Thomas: We are talking about this specific occasion when Louise came to the boxcar, Your Honor. I am trying to make it as simple as I can.

The Witness: When she came to the car, we was working.

Trial Examiner Downing: Were you talking?

The Witness: No. We were always working, loading the truck and take them in.

Q. (By Mr. Thomas): You were not arguing in a loud voice or talking in a loud voice or singing?

A. No. When she came in, we have no argument, nothing at all, no.

Q. Mr. Machoian, isn't it true that on the occasion that Louise Mesosian talked to you at or near the boxcar somewhere around the first of March, 1949, you were having an argument with Harry Ekzoozian about whether Mike Sohigian was in town and that you said at the top of your voice that he and all the Mosesians were liars when they said

(Testimony of Moses Machoian.)

that Sohigian was in town and was at the Mosesians the evening before?

A. No, I didn't call them a liar and I didn't say Sohigian was not in town. I didn't tell anything. [71]

Q. Isn't it true, Mr. Machoian, that Louise Mosesian came up to the boxcar to see what you and Harry and all the people were yelling about, and she so stated when she arrived at that boxcar?

A. No, she came over and started talking.

Q. Didn't Louise Mosesian, when she came up to you at the boxcar, ask you, "What the heck is going on here? Why aren't you working?"

A. No.

Q. And that you were to get back to work?

A. No.

Q. And isn't it true that she never mentioned, she, Louise Mosesian, did not mention at this time or any other time, mention to you, Mike Sohigian, Mr. Sohigian's name, and never mentioned your Union activities?

A. Yes, she told me—

Q. Answer the question.

Trial Examiner Downing: He is answering it. Go ahead and answer it.

A. (Continuing): When she came over to the car, she said, "Listen, Mose, we know you are the one that organized the Union over here, because Mike Sohigian, we find out from Mike Sohigian you did the same thing over at his place and they kicked you out over there and we are sure you are the one that made the fellows sign the Union papers." [72]

(Testimony of Moses Machoian.)

Q. (By Mr. Thomas): Mr. Machoian, isn't it true that Harry Ekzoozian and yourself alone were the ones that talked about Mike Sohigian or mentioned his name, and that Louise Mosesian never mentioned Mike Sohigian's name?

A. She did.

Q. (By Mr. Snell): Mr. Machoian, on the first occasion when Louise Mosesian came into the box-car, will you repeat what she said to you. Will you tell us what, the first time, Louise said in the box-car?

A. Yes, sir.

Trial Examiner Downing: What did she say, the first time?

The Witness: She called every worker, Eddie Ejadian, Bob Krikorian, Eccles and Harry and me, over in the car and she said, "Did you fellows sign any papers for Unions?" And we said, "No." She said, "Did Mr. Justice give you a paper to sign?" We said, "No." "Did anyone come in the warehouse to make you sign papers?" and we said, "No." And she said, "We got the letter from the Union. They are coming in and vote for it, and if you fellows join the Union, you people know what is going to happen."

Q. (By Mr. Snell): And at that time you had signed the application which is——

Trial Examiner Downing: Government's Exhibit 2.

Q. (By Mr. Snell, continuing): ——Government's Exhibit 2, the exhibit which is on the desk, Government's Exhibit 2, [73] is that correct? You

(Testimony of Moses Machoian.)

had signed that paper before Louise came into the boxcar? A. Yes, before.

Trial Examiner Downing: But you denied that you had done it?

The Witness: No.

Trial Examiner Downing: I say, you denied to her that you had signed it?

The Witness: I didn't say to Louise I signed the paper, no.

Trial Examiner Downing: You denied that you had signed any paper for the Union?

The Witness: No.

Mr. Bamford: I am not sure he understand the word "denied."

Mr. Snell: Let's go back on this.

Q. (By Mr. Snell): Did Louise ask you if you had signed any papers?

A. She asked everybody over there.

Q. She asked you, too, as part of the group?

A. She asked me, too.

Q. And you answered?

A. Yes. I said, "No."

Q. You said "No"?

A. I said "No."

Q. What papers did you think she was referring to? [74] What papers did you think she meant, when she asked you that?

A. The Union papers, any paper you signed for the Union.

Q. Any paper at all? In other words, when you said "No," you meant you hadn't signed any paper at all for the Union?

A. Yes, but I said "No," because the Union

(Testimony of Moses Machoian.)

said "Tell them no, when anybody comes over and ask you if you signed any paper. You have to tell them no."

Q. You told her no, when you knew that you had, in fact, signed a paper of the Union?

A. Yes, I know.

Q. Then you lied? A. That is right. [75]

* * *

Mr. Thomas: If Your Honor please, at this time we would like to move for an amendment of Article 6 of the Answer of the Respondent, State Center Warehouse & Cold Storage Company, so that we would like to add to said Article 6 the following:

Trial Examiner Downing: Do you have the amendment reduced to writing?

Mr. Thomas: Yes, sir.

Trial Examiner Downing: Counsel already has a copy?

Mr. Thomas: Yes, sir.

Trial Examiner Downing: Do you want to read the amendment?

Mr. Thomas: Yes, sir. That the period at the end of Article 6 be changed to a semicolon and the following be added thereto: "That said smoking was the immediate cause of his discharge, in that on said day he was twice caught smoking in violation of said rules and regulations, that there were other and cumulative causes which occurred and reoccurred throughout the entire course of his employment; to wit, singing, dancing, and loud talking on Respondent's warehouse premises during working hours, which disturbed the other employees [76]

(Testimony of Moses Machoian.)

and interfered with the proper performance of their work and the work of Moses Machoian himself.”

Mr. Bamford: General Counsel at this time will take no position on this amendment, save that if the motion to amend the Answer is granted, that at the conclusion of Respondent’s case the Examiner will consider a motion for a short continuance, if necessary, to secure rebuttal evidence as to the new issues raised by the Answer.

Trial Examiner Downing: You may have permission to make such a motion at that time.

The amendment will be granted.

Mr. Thomas: Thank you.

* * *

Q. (By Mr. Thomas): Mr. Machoian, you testified that Mr. Justice was your boss and that Louise Mosesian came over and just gave a few orders?

A. Sometimes. [77]

Q. Is that correct? A. Yes.

Q. Is Louise Mosesian your real boss?

A. No, but sometimes she gives the orders, do this and do that.

Q. She was only there occasionally?

A. That happened about once a couple of weeks, once in two weeks. If she need anything, she come over and order do this or do that.

Q. Was Mary Mosesian on the premises at all?

A. No, she never bothered at all. I never see her.

Q. Was Mrs. Twodi Mosesian on the premises?

A. Who?

(Testimony of Moses Machoian.)

Q. Mrs. Twodi P. Mosesian?

Trial Examiner Downing: I think he pronounces her first name differently.

Q. (By Mr. Thomas): The old lady, you call her.

A. Well, she came over there every day, looking how we work and all that.

Q. She never said anything? A. No.

Q. Never talked to you? A. No.

Q. Never talked to any of the other men?

A. No. When we come in the car, she come over and talk to [78] Harry, and when we go in, she comes over and watches how they work. That is all.

Trial Examiner Downing: Did she ever give you any orders at all?

The Witness: No.

Q. (By Mr. Thomas): How does it come about, Mr. Machoian, that according to your testimony, Louise talked to you twice within a period of three days, if she was only over there occasionally?

Mr. Bamford: I submit that that is a matter to be asked of Louise rather than the witness. The witness has testified that she did come and speak to him.

Trial Examiner Downing: I think the witness has explained the occasion for each of her visits; at least, what she did while she was over there. I will sustain the objection.

Q. (By Mr. Thomas): Did you ever make any complaints to Mr. Justice? A. No.

Q. Did you ever talk to Mr. Justice about your job? A. No.

(Testimony of Moses Machoian.)

Q. Did you ever go to him for directions?

A. I didn't get you.

Q. I am sorry. Did you ever go to him for orders, how to do your work? A. No. [79]

Q. You never talked to Mr. Justice about your job at all? A. Mr. Justice?

Q. Yes. A. No, I never talked about it.

Trial Examiner Downing: Who gave your orders?

The Witness: Mr. Justice gave us orders, yes, for doing everything.

Q. (By Mr. Thomas): You just said that Mr. Justice did not give you any orders.

A. Yes. He was the boss. [80]

* * *

Q. Mr. Machoian, what exactly were the Union activities that you did at the warehouse?

A. I don't understand you. What you mean?

Q. When did you decide to join the Union?

A. When? [81]

Q. When? A. It is January.

Q. Of what year? A. Yes.

Q. What year? A. 1948.

Q. Who was with you? A. Who was——

Q. Did you decide to join the Union alone?

A. No. The other fellows wants to join the Union, too.

Q. Who suggested that you join the Union?

A. Who suggested?

Q. Who? A. I don't understand.

Q. Who told you to join the Union?

(Testimony of Moses Machoian.)

A. I think myself, and we talked all together and we tried to get the Union in there.

Q. Did you talk to Bob Krikorian?

A. Yes, I did.

Q. And tell him that he should join the Union?

A. Yes.

Q. You were the one, then, that thought that you should join the Union?

A. Well, we all together think about it, and we go to the Union and sign up. [82]

Q. Did they suggest that you go over and talk to the Union? A. Eddie?

Q. No. Did Bob suggest? A. Bob, yes.

Q. Bob suggested that you join?

A. Well, we all together talked, "We have to have the Union over here, because they pay 80 cents an hour. We have to have the Union over here, if they don't have enough wages."

Q. I got lost. You said there is enough what?

A. There isn't enough wages that they pay.

Trial Examiner Downing: Who first started talking about the Union down there?

The Witness: I talked to Bob, and we all talked together, and they all wanted to go Union and sign up.

Trial Examiner Downing: I asked, who started talking about the Union first?

The Witness: I did to Bob.

Trial Examiner Downing: Thank you.

That is what you wanted to know?

Mr. Thomas: Thank you.

(Testimony of Moses Machoian.)

Q. (By Mr. Thomas): After you started talking to Bob, what did you do?

A. He started talking to the other fellows and we come all together and we went over to the Union and signed up.

Q. Bob Krikorian talked with Eddie? [83]

A. Eddie Ejadian and the other.

Q. Did you talk with them?

A. I talked with them, sometimes, too.

Q. Did Bob talk to them most of the time?

A. I don't know. You got to ask that question of Bob.

Q. When did you talk to these men? When did you talk to Bob and Eddie and——

A. I don't know. I don't remember when.

Q. Did you talk to these men during working hours? A. Yes, working hours.

Q. You talked to them while you were working on the job?

A. Yes, working on the job, we talked with each other, yes.

Q. Did you ever talk to Harry? A. No.

Q. You never mentioned the Union to Harry at all?

A. No. When Harry was there, we didn't talk about the Union, because we didn't trust Harry.

Q. So you wouldn't disclose anything to Harry?

A. No.

Trial Examiner Downing: Did he join?

The Witness: No.

(Testimony of Moses Machoian.)

Q. (By Mr. Thomas): What happened to Bob Krikorian?

A. What happened to Bob Krikorian?

Q. Yes.

A. I don't know what happened. [84]

Q. Is he still working at the State Center Warehouse?

A. No. He left that job before the election, before March 10th. He left one week before the election, I guess. He go on another job.

Q. Did you go to any of the Mosesians about the Union or your joining the Union——

A. No, I don't know.

Q. (Continuing): ——after you filed your application with the Union?

A. What do you mean?

Q. Did you ever talk to the Mosesians about your joining the Union? A. No.

Trial Examiner Downing: Did you ever tell them that you had joined?

The Witness: No. I never told them, no.

Q. (By Mr. Thomas): In fact, you told them that you had not joined?

A. I told them, yes, because they told us, "Don't tell them you joined the Union, because you lose your job, if you tell them you joined, before the election."

Q. Did any of the Mosesians talk to you either alone or as a member of a group about the Union?

A. No.

Q. They never mentioned Union to you after this

(Testimony of Moses Machoian.)

one incident [85] when Louise talked to you?

A. After the election?

Q. No, before the election.

A. Before the election, I told you that Louise came over to the car and told me about it.

Mr. Bamford: May I say that the witness testified that there were two occasions when Louise talked to them.

Mr. Thomas: That is correct. What I am trying to get at is that there were no other occasions after the second occasion.

Q. All right, Mr. Machoian, did Mary Mosesian ever talk to you as a group about the Union, as a member of the group?

A. She never talked to me about the Union, about nothing at all. She never talked to me.

Q. How about the day of the election?

A. After the election?

Q. On the day of the election did she talk to you?

A. She come over and tell me, the election day, "They are going to have an election about 2:00 o'clock," something like that. That is the only day.

Trial Examiner Downing: That was Mary?

The Witness: Mary, yes.

Trial Examiner Downing: I thought that you said she was never down there?

The Witness: The day on election she told me.

Trial Examiner Downing: I understood you to testify that [86] Mary was never down there at the

(Testimony of Moses Machoian.)

warehouse. Was that wrong or did I misunderstand you?

The Witness: The last day, on election day, she come up and tell me.

Trial Examiner Downing: Was she there any other time?

The Witness: No.

Q. (By Mr. Thomas): She was never there at the warehouse at any other time? A. No.

Mr. Siciliano: The answer is different from the question. May I ask a question?

Did Mary work at the warehouse, when you were there?

The Witness: Yes, sir.

Mr. Siciliano: Did she ever give you any orders?

The Witness: No, sir.

Trial Examiner Downing: This is cross-examination. Proceed. If any matters are dangling, straighten them out on redirect.

Mr. Siciliano: Yes.

Q. (By Mr. Thomas): Mary Mosesian talked to you alone or in the group?

A. Harry with with me on election day.

Q. What did she say?

A. She said, "The election is going to be this afternoon."

Q. What else did she say? [87]

A. "You fellows have to go and vote. If you said no, that means us. If you said yes, that goes Union." That is all she told me.

Q. Isn't it true that Mary Mosesian called all of

(Testimony of Moses Machoian.)

the men together on the day of the election and said to you men all there together, "You are now going to vote on this election today"? A. No.

Mr. Bamford: May I object at that time? This matter wasn't brought out on direct examination. We are not alleging any group meeting as being an unfair labor practice. The questioning seems to me to be beyond the scope of the direct examination and, too, irrelevant and immaterial.

Mr. Thomas: If Your Honor please, the reason we are asking that is that we wish to show through the employers that at the time of the election, they told the employees that insofar as they were concerned, they voted whichever way they wanted to vote, that it was none of their business.

Trial Examiner Downing: Is that the purpose for which the testimony is being adduced?

Mr. Thomas: That is correct.

Trial Examiner Downing: The objection will be sustained.

Q. (By Mr. Thomas): Mr. Machoian, you have testified that all of the other men smoked in the warehouse, including Mr. Justice? [88]

A. Yes.

Q. Did you see Bob Krikorian smoke in the warehouse? A. Yes, sir.

Q. Did you see him smoke near the——

A. Yes.

Trial Examiner Downing: Just a moment. Wait for the question, please, before you try to answer.

(Testimony of Moses Machoian.)

You can't answer something you haven't heard.

Q. (By Mr. Thomas): Did you see Bob Krikorian smoke—— A. Yes.

Trial Examiner Downing: Wait until the question is finished, please, sir.

Q. (By Mr. Thomas): Did you see Bob Krikorian smoke among the cardboard cartons?

A. Cardboard cartons?

Q. Yes.

A. No. He smoked on the ground. You never smoke on the cardboard.

Q. Where on the floor did Bob Krikorian smoke?

A. On the cement floor like this, in the warehouse.

Q. Where?

A. Even upstairs and downstairs. It is a cement floor.

Trial Examiner Downing: In the warehouse?

The Witness: Yes.

Q. (By Mr. Thomas): Did he smoke before Mrs. Mosesian? [89] A. What?

Q. Did he smoke in front of Mrs. Mosesian?

A. Yes, lots of times.

Q. You mean that Mrs. Mosesian saw him smoking? A. Yes.

Q. Did he smoke in front of Louise Mosesian?

A. Yes.

Q. You saw this? A. Yes, I saw it.

Q. You saw him smoking in front of her?

A. Yes. Louise saw him smoking and she never

(Testimony of Moses Machoian.)

tell a word to me or Bob or anybody. I don't know. I never heard.

Q. Did you ever see Eddie Ejadian smoke?

A. Yes, sir.

Q. Did he smoke inside the warehouse?

A. Inside the warehouse and outside on the platform, yes.

Q. Did you see him smoke in front of Mrs. Mosesian? A. I never seen him, no.

Q. Did you see him smoke in front of Louise Mosesian?

A. I don't know. I never seen him.

Trial Examiner Downing: Did you see him smoke in front of Mr. Justice?

The Witness: Yes.

Q. (By Mr. Thomas): Did you see him smoke in front of Mary Mosesian? [90]

A. I smoked. She never tell me anything. I don't know about anybody else.

Trial Examiner Downing: That is not the question. Read the question, please, Mr. Reporter.

Now, listen to the question, and answer it, please.

(Last question read.)

A. Who, me?

Q. (By Mr. Thomas): No, Eddie.

Trial Examiner Downing: Did you see Eddie smoke in front of Mary Mosesian?

The Witness: I can't see them all, but I did see they all smoking over there.

Q. (By Mr. Thomas): That is not the question I asked you, but you did see Bob Krikorian smoke in front of Mrs. Mosesian?

(Testimony of Moses Machoian.)

A. I saw him one time, but she didn't say nothing.

Q. And he said nothing? A. No.

Trial Examiner Downing: Did you ever smoke in front of Mrs. Mosesian?

The Witness: Sometimes, yes, but she didn't say nothing about us smoking.

Trial Examiner Downing: She said nothing to you at all?

The Witness: No. She said nothing about me smoking.

Trial Examiner Downing: Were you in the warehouse at the time? [91]

The Witness: No, when we was working in there.

Trial Examiner Downing: I say, when you were smoking in front of Mrs. Mosesian, were you in the warehouse at the time?

The Witness: I was in the warehouse or on the platform.

Trial Examiner Downing: Which was it, warehouse or platform?

The Witness: Warehouse.

Trial Examiner Downing: Which?

The Witness: The warehouse. I was smoking in front of her and she didn't tell me a word about the smoking.

Q. (By Mr. Thomas): Where did Mr. Justice smoke? A. He see me lots of times.

Trial Examiner Downing: The question is, where did he smoke?

(Testimony of Moses Machoian.)

The Witness: Mr. Justice? He smoked everywhere, inside, outside.

Q. (By Mr. Thomas): Did Mr. Justice ever go between the stacks?

A. Yes, he was sometimes.

Q. Did you ever see him smoke between the stacks?

A. No. I see him smoke everywhere. He goes over the stacks with a cigar in his mouth or a pipe is in his mouth.

Q. When you say he smoked every place, Mr. Machoian, what did he smoke?

A. Who? [92]

Q. Mr. Justice.

A. Mr. Justice smoked a pipe, smoked cigars.

Q. When he went into the warehouse, was his pipe lit?

A. Yes. He smoked a pipe, when I seen him.

Q. Have you seen it lit?

A. Yes, every day.

Q. In the warehouse? A. Yes.

Q. Where we say it was forbidden to smoke?

A. Yes. He comes over there lots of times, give us the order, and do this or do that, and he had the pipe in his mouth smoking, or a cigar.

Q. They were always lit?

A. Always what?

Q. The cigar. A. Yes, smoking.

Trial Examiner Downing: By "between the stacks," do you mean the stacks of goods there on the warehouse floor?

(Testimony of Moses Machoian.)

The Witness: Well, he come over there and——

Trial Examiner Downing: Listen to my question. Where are all these stacks that you are talking about? I don't know. You mean the stacks of goods?

The Witness: Flour or rice or everything.

Mr. Thomas: I didn't hear the answer.

Trial Examiner Downing: Stacks of goods. It could have [93] been smoke stacks in his original answer. That is what I wanted to know.

The Witness: I can't give all the names—— flour——

Trial Examiner Downing: That is enough.

Q. (By Mr. Thomas): Mr. Justice didn't restrict his smoking spot aiseways?

A. You just tell me again.

Q. Mr. Justice didn't only just smoke in the aisles?

A. He smoked any place. What do you mean, "aisles"?

Q. You have aisles in the warehouse that go straight down.

A. When he went in the stacks, he smoked. [94]

* * *

Q. Were you ever warned during the period of your employment [96] with the State Center Warehouse to stop singing and dancing? A. No.

Q. Mr. Machoian, isn't it true that Louise Mosesian came out to near the middle elevator to where you and Harry were working, sometime be-

(Testimony of Moses Machoian.)

fore the election, and told you to stop singing and dancing, that this was no wedding but a warehouse?

A. No.

Q. Mr. Machoian, isn't it true that on several other occasions during your employment from November of 1948 to April 12, 1949, in the presence of Harry Ekzoozian, that Louise Mosesian warned you to stop singing and loud talking and that you were disturbing the office?

A. No, sir.

Q. Mr. Machoian, isn't it true that in Harry Ekzoozian's presence Mary Mosesian told you, while you were employed at the State Center Warehouse, during working hours to stop your singing and loud talking?

A. No, sir.

Mr. Bamford: May I have the question read back, please.

Mr. Thomas: Will you read that back, please, Mr. Reporter?

(Last question read.)

Q. (By Mr. Thomas): On at least two separate occasions, because you were disturbing the office?

A. No.

Q. Mr. Machoian, isn't it true that in Harry Ekzoozian's [97] presence Mrs. Twodi P. Mosesian told you to stop singing and your loud talking during working hours on several occasions?

A. No.

Q. That you were disturbing the office?

A. No, sir. [98]

* * *

Redirect Examination

By Mr. Siciliano:

Q. Now, you mentioned that you saw Robert Krikorian smoke? A. Yes.

Q. In front of Mama Mosesian? How many times did you see him smoke?

A. I can't see him all the time. I just saw him once.

Q. You saw him once? A. Once.

Q. Now, where was this?

A. In the warehouse.

Q. In the warehouse? A. Yes. [102]

Q. Inside the warehouse?

A. Inside the warehouse. [103]

* * *

LOUISE MOSESIAN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Mr. Bamford: I am calling Miss Mosesian as an adverse witness under 43-B.

* * *

Q. Did you hear Mr. Machoian testify with respect to an incident in the boxcar, the so-called second incident, in [104] which Machoian said that you had spoken to him about his Union activities at his former place of employment, Sohigian's?

(Testimony of Louise Mosesian.)

A. Yes.

Q. You heard that testimony?

A. Yes, sir, I did.

Q. In substance, did such a conversation take place?

A. No, sir.

Q. Did you ever discuss with Machoian his Union activities?

A. No, sir, I haven't.

Q. Did you know he was a member of the Union?

A. I did not know, sir.

Q. Did you suspect he was a member of the Union?

A. No, sir. I didn't have the remotest idea.

Q. When did you first hear of the Union attempt to organize State Center?

A. A man by the name of Bob Franklin called and said he wanted to see us, an inter-relations man here in Fresno.

A. When was that?

A. A couple of weeks before we received a letter from the National Labor Board.

Q. That is the first letter in which the Teamsters had filed a petition?

A. Yes, sir.

Q. It was stipulated that that letter was mailed on February 10th. I suppose that it was a day or so after that, that [105] you received the letter?

A. Yes, sir.

Q. But Mr. Franklin had called you several weeks before, is that correct?

A. About a couple of weeks before. I think he said that someone by the name of McDonald had called him and said that he wanted to see Bob

(Testimony of Louise Mosesian.)

Franklin regarding the State Center Warehouse, and Bob came over to see us at our home and he said McDonald had told him that the warehouse boys were unionizing, and so Bob told us that we had——

Mr. Thomas: If Your Honor please, there are so many Bobs here that I suggest the witness say Bob Franklin.

A. (Continuing): Bob Franklin, and he said we had to call an election. So we just let him take the steps, because we didn't know what it was all about.

Trial Examiner Downing: Who is Bob Franklin with?

The Witness: He is an inter-relations man here in town. He used to own the Franklin Refrigerator. He is an inter-relations man here in town.

Trial Examiner Downing: When he came to see you, was he representing the Union?

The Witness: No, sir.

Trial Examiner Downing: How did he get into it?

The Witness: Well, before the Taft-Hartly Bill went into effect, we had some little squabble with the Union [106] pickets about a year or so before that, and so we went to a friend of ours and he told us to go to Bob Franklin.

Trial Examiner Downing: Franklin was representing you, then?

The Witness: Yes, sir.

Trial Examiner Downing: He was what you might call your labor consultant?

(Testimony of Louise Mosesian.)

The Witness: Yes, sir.

Q. (By Mr. Bamford): Essentially, you turned over the problem to him? A. Yes.

Q. That was before you received the letter from the NLRB, advising that they had filed a petition?

A. Yes. That was a couple of weeks before that.

Q. Do you know Mike Sohigian?

A. Yes, I do.

Q. He is the manager of what company, do you know? Industrial Scientific Company?

A. Yes, sir. That is the name.

Q. How long have you known him?

A. I have known him practically all my life.

Q. Is he related to your family?

A. No, sir.

Q. Is he a close personal friend of your family?

A. Well, we used to be both in the same singing chorus. [107] We both took singing lessons from a Molly Marshall, and he used to be in our singing chorus. That is how I knew Michael. I knew him through the church.

Q. Well, is he a close personal friend?

A. Well, he is a casual friend, not that I would say close, but I know him. I just knew him mostly through this singing class that we used to go to at Molly Marshall's. There was a group that used to go once a week, and he was in the singing class. I know him pretty well.

Q. You see him socially? A. Yes.

Q. Do you ever go to his house?

(Testimony of Louise Mosesian.)

A. Yes. I know his wife very well. We go to the same church.

Mr. Thomas: Will you ask the question again?

Mr. Bamford: Will you read back the question?

(Last question read.)

A. No, sir, I don't make it a point to go to his house.

Q. (By Mr. Bamford): Well, you go there from time to time?

A. If I see him in front of the house, I will stop and talk to him.

Q. Is his house nearby yours?

A. No, sir.

Q. Has he ever come to your house?

A. Yes, he has. [108]

Q. How often does he come?

A. He has been there on several occasions with his wife and his family.

Q. That is within the past year or so?

A. Yes, sir.

Q. Did you ever speak with Sohigian about this Teamster attempt to organize your plant?

A. No, sir.

Q. On any occasion? A. No, sir.

Q. Did you ever discuss Moses Machoian's employment with him? A. Yes, sir, we have.

Q. How did that arise?

A. Well, one day this Sohigian stopped in to visit the family for a minute.

Q. When was this?

A. This was right after the first—it was after the holidays.

(Testimony of Louise Mosesian.)

Trial Examiner Downing: Which holidays?

The Witness: Last year.

Trial Examiner Downing: Christmas?

The Witness: After New Year's, I think it was.

Q. (By Mr. Bamford): That is, Christmas of 1948, is that correct? [109]

A. About the first part of the year or——

Q. Or the first part of January 1949?

A. Yes, sir. And we were discussing just everything in general. I asked him if he was still singing for Molly's class, and he said, well——

Trial Examiner Downing: Let's get down to Machoian.

The Witness: We were discussing just everything in general, the ice cream parties that the church was having, and it was just a general conversation and talking about business and everything in general, and I said, "Say," I says, "of all the people, my mother sure does hire some crazy people. We have a man in the warehouse, that all he does is just sing Turkish songs and dances around." And he said, well, he says, "It looks like we all have the same problems." And I asked him who the fellow was. He said, "A fellow by the name of Mose."

And I said, "Well, isn't it funny. We have a fellow by the name of Mose, too, that does singing and dancing around, a fellow you can't tell anything to."

And so we exchanged the names and it was the same fellow. [110]

(Testimony of Louise Mosesian.)

Trial Examiner Downing: Was he working for both of you at the same time?

The Witness: No, sir. That particular day that Mike Sohigian had called with his family to visit us, that was the day that I had given Machoian 'Holy Pat' for singing in a boisterous voice, and talking and singing and dancing around in the warehouse. I bawled him out that day for it.

Q. (By Mr. Bamford): Now, at that time you hadn't received word either from the NLRB or from Franklin, that you were being organized?

A. No, sir.

Q. That occurred before that?

A. That occurred before that.

Q. And in that conversation nothing was said about Machoian's Union activities?

A. No, we didn't discuss it. [111]

* * *

Cross-Examination

By Mr. Thomas:

Q. Who else was present at the time of this meeting, Louise, with Sohigian?

A. That night that Sohigian visited at our family home, [117] Harry Ekzoozian and his wife had stopped in to see my mother, too, around that part.

Trial Examiner Downing: Who?

The Witness: Harry Ekzoozian and his wife. And I think Violet Misikian, my sister Mary, my

mother. I was there, and I don't remember if there was anyone else there or not.

Q. (By Mr. Thomas): When you were talking to Mr. Sohigian, what did Mr. Sohigian say about Mr. Machoian?

A. Well, the conversation was general. He says he discharged Machoian because Machoian was breaking dies and wasting material, and we laughed over the word "die." I didn't know what "die" was. I said, "What did he do? Die?" And he said, "He broke dies." [118]

* * *

MICHAEL SOHIGIAN

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Bamford:

Q. Do you know Moses Machoian?

A. Yes, sir.

Q. Did he ever work for you? A. Yes, sir.

Q. What period of time, do you remember?

A. October 1, 1946, to approximately January 21 of 1948.

Q. Do you know the Mosesian family?

A. Yes.

Q. Specifically, do you know Louise Mosesian?

A. Yes.

Q. How long have you known her? [120]

A. Approximately 20 years.

(Testimony of Michael Sohigian.)

Q. Did you ever discuss Moses Machoian with Louise Mosesian? A. Yes.

Q. On more than one occasion? A. Yes.

Q. Do you remember on the first occasion when you discussed Machoian?

A. I don't remember the date exactly, but I do remember the occasion.

Q. Well, could you give us an idea as to when that was?

A. I am of the impression that it was during the holiday season, the end of the year, of 1948.

Q. And what was the occasion?

A. Our family was paying a visit to the Mosesian family.

Q. And by your "family" who do you mean?

A. My wife and my three children.

Q. Was this at the Mosesian home?

A. Yes.

Q. Who else was present?

A. I don't know the last name of the girl, but her first name is Violet. I think it was Misikian, if I am not mistaken. And Mr. and Mrs. Harry Ekzoozian.

Q. Was Mrs. Twodi Mosesian there?

A. Mrs. Mosesian was present. [121]

* * *

Q. And what was said and by whom concerning Moses Machoian?

A. In a general course of conversation it was mentioned that there was a gentleman working at

(Testimony of Michael Sohigian.)

the warehouse of the Mosesian's, and there was some description regarding his conduct.

Q. Could you tell us what that conduct was and what the description was in substance?

A. Yes. The substance was that his conduct was of an offensive nature and that he was smoking when he was asked not to and that it was not allowed in the warehouse, and also that he was of a boisterous nature and frequently sang in a loud voice, and that he had been asked not to do so but repeated to do so.

Q. And that was the substance of the conversation?

A. Yes.

Q. Concerning Machoian?

A. Yes.

Q. Now, on any other occasion did you discuss Machoian?

A. That wasn't all of the substance. I am sorry.

Q. Please continue.

A. The remainder of it, as it went along, interspersed with small talk regarding family and children.

Q. But with respect to Machoian?

A. With respect to Machoian, I asked—rather, I said, [122] “Well, that sounds familiar.” I said, “Who is this man?” or something of that nature. I said, “I had someone working for us there that seemed to answer that description.” And they told me, and I said, “Well, he had worked for us at one time.” And we went on talking about things in general. I mentioned that he had been discharged from our employ because of incompetence, ineffi-

(Testimony of Michael Sohigian.)

ciency, and that in substance was, I think, perhaps all that was said.

Trial Examiner Downing: Did you specify in what respects he was incompetent and inefficient?

The Witness: Yes, I did.

Trial Examiner Downing: In what respects did you state?

The Witness: In respect to this, may I explain that in our plant my particular job had to do with the supervision of part of the men in the department that is assigned to me, and in that department I observed repeatedly that Mr. Machoian needed an extreme amount of supervision and that he was incapable of putting the correct labels where they belonged, and I at no time called this to his attention, because I thought that he was incapable of correcting himself.

Trial Examiner Downing: My question relates to what you said to the Mosesians in regard to why you found him incompetent.

The Witness: Well, I told them just that as well as that on several occasions when he was asked to work on punch [123] presses, that he had inserted not one piece of work into the die but two, which would on occasion stop the machine and on one occasion broke a die, and that I had been told by the supervisor in that department that such was the case and I had been asked to talk to him, explain to him, that on several occasions he had been warned about that, and that he apparently continued to do that without regard, I should say, continually. [124]

(Testimony of Michael Sohigian.)

Q. (By Mr. Bamford): Now, did you ever discuss Machoian with Louise Mosesian on any other occasion?

A. Yes, I did.

Q. And when was that?

A. It was subsequent to this occasion, but I can't in all honesty recall the exact dates or even approximate dates.

Q. Well, tell us how the conversation took place. Was it by telephone or in person?

A. I don't remember any conversation by telephone. In person.

Q. And where did this occur?

A. In their home.

Q. Who was present?

A. Mrs. Mosesian, Louise Mosesian, and Mary Mosesian.

Q. Do you remember how you happened to go there? [125]

A. Yes, just as a casual visit.

Q. Do you remember being interviewed on May 27, 1949, by an NLRB Field Examiner?

A. I don't remember the date but I do remember the interview, yes.

Q. And did you give the Examiner a sworn statement?

A. I gave her a statement but I don't remember whether it was sworn or not.

Q. You signed the statement, at any rate?

A. I think I did, yes.

Mr. Bamford: Excuse me just a moment, Mr. Examiner.

(Testimony of Michael Sohigian.)

Q. Is this the statement? A. I think so.

Q. Now, would you read that statement, please.

Mr. Thomas: May I interrogate here? That is all in the handwriting of somebody else.

Trial Examiner Downing: He has identified the statement. He has been asked to read it so far. I don't think there is anything before me up to this point.

Q. (By Mr. Bamford): Now, looking at the——

Trial Examiner Downing: He hasn't finished reading it.

Mr. Bamford: I am sorry.

The Witness: Am I to read it?

Mr. Bamford: Yes.

Trial Examiner Downing: I think you asked him. [126]

The Witness: All right.

Q. (By Mr. Bamford): Have you finished?

A. Yes.

Q. For purposes of refreshing your recollection, I am wondering if you would start with the second paragraph, down about the third sentence. You say, "Sometime before the Union election at State Center Warehouse and Cold Storage Company, Louise Mosesian telephoned me."

Now, does that refresh your recollection on the second meeting? A. No, it doesn't.

Q. You have no independent memory?

A. No, sir.

Q. At this time?

A. No, sir. This subject as well as this inter-

(Testimony of Michael Sohigian.)

view has been so foreign from my line of work or my consciousness that I can't say that I remember these things all exactly as they appear here.

Trial Examiner Downing: When did you last see the statement?

The Witness: This statement?

Trial Examiner Downing: Yes, or a copy of it.

The Witness: I haven't seen it since apparently this was written.

Trial Examiner Downing: When were you last questioned [127] with reference to the subject matter of the statement?

The Witness: I haven't been questioned at all.

Trial Examiner Downing: Since it was taken?

The Witness: Yes.

Q. (By Mr. Bamford): The events were fresh in your mind, though, at the time you gave the affidavit, weren't they?

A. The events having to do with Mr. Machoian?

Q. Yes.

A. Not necessarily even then, for the simple reason that his working for us and his subsequent discharge was of no particular interest or it was uneventful to us. It was an occurrence with which we had to do on a number of occasions and it presented no particular interest. It was not singular in its aspects.

Q. I don't want to impeach you, Mr. Witness, but your memory was very fresh on an incident which had occurred before this alleged incident, and I am wondering if you could explain how it happens that——

(Testimony of Michael Sohigian.)

A. At the time this was taken, I think that the young lady who took this statement will recall that I was exceedingly busy, as we very often are, and I was forced to go in and out of the place on a great many occasions and, very frankly, though the expression I wish to use is not necessarily "resent," but I was anxious to be rid of the situation so that I could continue with my work. [128]

Trial Examiner Downing: I should like to ask whether, after having read the statement here, there is any respect in which you wish to change any of the testimony you have given up to this point, after having read the statement? Is there?

The Witness: Any changes?

Trial Examiner Downing: In the testimony you have given up to now, having read the statement, that you wish to make?

The Witness: Not in any of the testimony I have given now.

Q. (By Mr. Bamford): You signed the statement? A. Yes.

Q. Did you read it before you signed it?

A. Yes, I did.

Q. Then you signed it after you read it?

A. Yes.

Q. Do you remember being administered the Oath by the Field Examiner? A. No.

Q. You notice the jurat on the statement?

A. The what?

Q. The jurat.

A. I don't know what you mean.

(Testimony of Michael Sohigian.)

Trial Examiner Downing: Right at the end.

The Witness: Yes, I do.

Trial Examiner Downing: Was that on there when you signed it?

The Witness: I don't remember.

Q. (By Mr. Bamford): Well, let's discuss then the second discussion you had with Louise Mosesian concerning Machoian.

A. Not necessarily with Louise directly, with all the family.

Trial Examiner Downing: Now, when was that? I don't think that the time has been fixed.

Mr. Bamford: Well, the witness stated that he didn't know the time exactly.

Trial Examiner Downing: Well, let's fix it with reference to the time elapsing after the first one during the holidays. How long after that was it, roughly?

The Witness: The closest I could honestly come to it would be that it would be a matter of months.

Q. (By Mr. Bamford): Well, during this discussion was the subject of an NLRB election at their plant discussed? A. I don't recall.

Trial Examiner Downing: Does your reading of the statement refresh your mind any in that respect?

The Witness: The statement says so, yes.

Trial Examiner Downing: I am asking you if it refreshes your mind any. I am not asking you what the statement says. [130] It is not in evidence at this time.

(Testimony of Michael Sohigian.)

The Witness: Not with any degree of certainty.

Trial Examiner Downing: Does it refresh your mind at all?

The Witness: It refreshes my mind only in so far as—well, I can't point out exactly here. [131]

* * *

Q. (By Mr. Bamford): Do you remember discussing in this second conversation with the Mosesians anything concerning a possible election, an NLRB election, with the Mosesians?

A. I can't peg it to the second, because we have had hundreds of conversations with these people over a period of years, and certainly subsequent to the first time, we have talked to them. We have talked on numerous occasions but there [137] has been conversation in that regard.

Q. With respect to NLRB elections?

A. Yes.

Q. Well, I am merely trying to find out now if you can place the date of this conversation?

A. I can't place the date conscientiously, no.

Q. Could you have discussed that at this meeting?

A. I suppose I could have.

Q. Could you have discussed Machoian's Union activities with them at this meeting?

A. I suppose I could have.

Mr. Thomas: I object to this line of questioning, your Honor. I don't quite understand—

Mr. Bamford: You will understand the meaning of it, counsel. Do you think that the questions are irrelevant?

(Testimony of Michael Sohigian.)

Mr. Thomas: They are asking for pure suppositions without any evidence. [138]

* * *

Cross-Examination

By Mr. Snell:

Now, you testified on direct examination that you conversed with the Mosesians on occasions subsequent to the meeting at the home of Mrs. Mosesian?

A. Yes, sir.

Q. And that on those occasions you discussed Mr. Machoian? A. Yes, sir.

Q. Do you have any recollection as to any specific instances [143] when you so discussed Mr. Machoian with the Mosesians?

A. Nothing specific, but they were varied insofar as the place of discussion was concerned.

Q. Do you have any recollection of specifically discussing Mr. Machoian with Louise Mosesian subsequent to the first meeting at Mrs. Mosesian's home? A. Yes.

Q. What was that occasion?

A. On subsequent visits to their home as well as that I would drop into their office once in a while. I can't recall whether we have actually discussed the subject there or not.

Q. On direct examination you stated that you discussed Mr. Machoian with the whole family on these various occasions. A. Yes.

Q. Are these the occasions you are referring to, when you say that you discussed them with Louise Mosesian? A. Yes.

(Testimony of Michael Sohigian.)

Q. Were you talking generally to the group or did you talk to one particular person within the group? A. To the group generally.

Q. Do you know whether Louise Mosesian was listening to you at the time you made the statement?

A. I think I would be safe in saying yes.

Q. Do you remember specifically ever discussing the matter of the election at the State Center Warehouse with the [144] Mosesians? A. Yes.

Q. Do you remember when those discussions occurred?

A. No, not definitely, but I am of the opinion that it was a matter of months after the first time we had occasion to discuss Mr. Machoian.

Q. Would you say it was two months after the first occasion? A. I think so.

Mr. Bamford: Just a second. May I have the last question read back, please.

(Last question read.)

Q. (By Mr. Snell): Would you say that it was two months after the first discussion with the Mosesians at their home?

A. I wouldn't want to say definitely, because it would be, I would say, guesswork.

Q. Do you know when the election was held, the Union election was held, at the State Center Warehouse? A. No, I don't know.

Trial Examiner Downing: Was it before the election was held?

The Witness: I don't know anything about the election. I don't know when it was held.

Q. (By Mr. Snell): To the best of your recol-

(Testimony of Michael Sohigian.)

lection, it was months after the first conversation, that you discussed this matter? [145] A. Yes.

Q. Do you remember at the first conversation at the Mosesians if you discussed Mr. Machoian's Union activities with the Mosesians?

A. I don't remember definitely.

Q. Do you remember discussing Mr. Machoian's Union activities at any time subsequent to that?

A. Yes.

Q. Would these conversations have occurred at the same time as you have placed the prior discussions of the election?

Mr. Bamford: May I have that question back, please.

Mr. Snell: I will rephrase the question.

Q. You have testified that it was a matter of months after the first conversation, that you discussed the matter of the Union election with the Mosesians? A. Yes.

Q. Did the discussion of Mr. Machoian's activities occur at the same time as the discussion of the Union election? A. I can't remember.

Q. It could have been earlier or it could have been later? A. Yes.

Q. You have no independent recollection?

A. No, sir.

Trial Examiner Downing: Do you understand that you are testifying that on some occasion you discussed the subject of [146] Machoian's Union activities with the Mosesians?

The Witness: Yes, sir.

(Testimony of Michael Sohigian.)

Trial Examiner Downing: With which ones?

The Witness: All of them in general. I can't peg the conversation to any one particular person.

Trial Examiner Downing: Was that on one of the visits at their home?

The Witness: Yes.

Trial Examiner Downing: How did the subject of his Union activities ever come up?

The Witness: I don't remember.

Mr. Snell: We have no further questions.

Trial Examiner Downing: Any redirect examination?

Mr. Bamford: No further questions.

Trial Examiner Downing: How did the subject of the election happen to come up, the National Labor Relations Board election?

The Witness: I don't recall.

Trial Examiner Downing: Was it something that was to happen in the future or was it already something that had occurred?

The Witness: I don't know until this moment whether or not such an election has occurred, so I guess that it would be safe to say that it was something to occur in the future in relation to that time. [147]

Mr. Snell: I would like to have the answer stricken, because he has by his testimony shown that he is simply surmising that he doesn't know. [148]

(Testimony of Edward Ejadian.)

EDWARD EJADIAN

a witness called by and on behalf of General Counsel, being [150] first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Siciliano:

Q. Now, while you were working there, did you ever think about joining the Union? A. No.

Q. Did anyone ever come to you and ask you about joining a union? A. Yes, sir.

Q. Do you remember when this was?

A. No, I don't remember.

Q. Who came and asked you about the Union? Who did you talk about the Union with?

A. They talked to me about the Union.

Q. Who?

A. I think it was Bob.

Q. Bob? A. Bob Krikorian.

Q. Did Moses ever talk to you about the Union?

A. Well, later on, yes.

Q. What did he say to you?

A. He said, "It is a good thing to join the Union." [152]

* * *

Q. Did Louise ever come and ask you anything about the Union? A. I don't remember that.

Q. Were you ever working around the warehouse when Louise came to see you?

(Testimony of Edward Ejadian.)

A. It has been so long, I even forget those things. [155]

Trial Examiner Downing: Let me ask you this question, Witness: Were you ever present when Louise said something about having a letter from the Labor Board about the Union?

The Witness: I don't remember that. [156]

* * *

Q. Do you know if your mother-in-law works?

A. Yes. She works on Saturdays over there.

Q. Over where? [159]

A. Over at the Mosesians.

Q. Over at the Mosesians? A. Yes.

Q. What does she do there?

A. Housework.

Q. Did she ever tell you anything about your job?

Mr. Thomas: Wait. I just don't know what the mother-in-law would tell him would be admissible in evidence.

Mr. Siciliano: That is what we hope to show.

Mr. Thomas: Actually, it is pure hearsay.

Mr. Siciliano: We hope to show that the mother-in-law was actually the agent for the Mosesians.

Mr. Thomas: If the mother-in-law is here, you can have her testify.

Trial Examiner Downing: If the mother-in-law is available as a witness, her own testimony would certainly be more direct, one step nearer.

Mr. Siciliano: We recognize that, but as to the effect of the statements made on this particular

(Testimony of Edward Ejadian.)

witness, we hope to show that the mother-in-law was, in effect, an agent of Mrs. Mosesian, who was told to say certain things to her son-in-law.

Mr. Thomas: Don't you have to establish the agency first? [160]

* * *

Q. (By Mr. Siciliano): Mr. Ejadian, did your mother-in-law bring you a message from Mrs. Mosesian about the Union, about joining the Union?

A. Yes. I think I understood. She says if I ever joined the Union, she is going to put me out.

Q. Who said that?

A. Mrs. Mosesian. That is what I understood.

Q. She didn't say that to you?

A. She told that to my mother-in-law.

Q. And your mother-in-law told you?

A. She told me that.

Q. When did your mother-in-law tell you that?

A. I don't remember.

Q. Where was it? Was it at your mother-in-law's house?

A. Yes.

Q. You went there to visit?

A. Yes.

Q. Was it in the evening? [161]

A. Evening, I think.

Q. Was this before the election?

A. After.

Q. This was, when your mother-in-law came and talked to you, this was after the election was already over with?

A. No, before.

Q. Before the election?

A. Yes.

(Testimony of Edward Ejadian.)

Q. Was anything said about Moses Machoian to you?

Trial Examiner Downing: By whom?

Q. (By Mr. Siciliano): By your mother-in-law?

Mr. Thomas: If your theory is that his mother-in-law is an agent for Mrs. Mosesian to convey a message to him, how do you get Machoian in on the picture?

Mr. Siciliano: We are trying to show that part of that message extended to Machoian. [162]

* * *

Mr. Bamford: If Mrs. Mosesian tells her housekeeper to relay a message to her son-in-law, she thereby appoints as her agent the housekeeper to relay that message. [163]

* * *

Mr. Siciliano: I will just repeat that last question. I think that will be about the last, too.

Q. Did your mother-in-law tell you that Mrs. Mosesian had told her anything about Moses, about Moses joining the Union?

Mr. Thomas: You made her an agent. Now, if you are going to put up your question of agency, you didn't—you said there that Mrs. Mosesian said something to his mother-in-law as an agent to convey it to him.

Mr. Siciliano: That is what we have been saying so far.

Mr. Thomas: Her statement with regard to

(Testimony of Edward Ejadian.)

Machorian's joining any Union is certainly not an agency direction.

Trial Examiner Downing: I will permit the testimony to be developed under the previous ruling.

Q. (By Mr. Siciliano): Mr. Ejadian, did your mother-in-law say anything to you about Moses Machorian?

A. I can't remember those, because it has been so long and I forgot all those things. [165]

* * *

Q. (By Mr. Siciliano): And how long did you talk to her?

A. I don't remember that.

Q. A half an hour, an hour?

A. I don't remember that. Maybe, something like that.

Q. And did she put some things down in writing? A. I think so.

Q. And did she read them to you?

A. Yes, sir.

Q. Can you read? A. I can't read.

Q. But she did read them to you?

A. If she read them, I forget them anyhow. I forget all of those things. I can't remember them all.

* * *

Mr. Bamford: We just wanted to see if the reading of the affidavit would refresh the witness' memory. It will just take a second, Your Honor.

Trial Examiner Downing: Yes.

Mr. Bamford: This is our last point.

(Testimony of Edward Ejadian.)

Mr. Siciliano: I am not going to read it all, just one paragraph.

Trial Examiner Downing: Now, Witness, I want to explain to you that counsel is going to read to you from a paper [166] which was written by Mrs. Phoenix, the lady in the room here, after talking with you about this case. You listen to it and you see if you remember the statement you gave, and say whether or not that refreshes your mind about the question that he has been asking you.

The Witness: Yes.

Q. (By Mr. Siciliano): I will read just these few words here: "Before the election, my mother-in-law, Agnes Azidigian, who works Saturdays doing housework with Mrs. Mosesian, told me that Twodi had said to her that if Mose and I joined the Union, she would fire us."

Does that help you remember at all? Does that refresh your recollection as to what your mother-in-law told you? A. I think so.

Trial Examiner Downing: Do you remember now?

Q. (By Mr. Siciliano): Do you remember now?

A. I think so now, because it has been so long, I forget.

Mr. Siciliano: That is all.

Trial Examiner Downing: Was that statement that counsel read to you correct?

The Witness: Yes, sir. [167]

(Testimony of Edward Ejadian.)

Redirect Examination

By Mr. Siciliano:

Q. Eddie, yesterday, we asked you some questions. One of the questions I asked you was: Did your mother-in-law ever tell you anything that Mrs. Mosesian had told her to tell you.

A. Machoian?

Q. Mosesian. Your mother-in-law worked for Mrs. Mosesian? A. Yes.

Q. Now, yesterday I asked you a question, I asked: Did your mother-in-law tell you anything that Mrs. Mosesian had told her about the Union?

Trial Examiner Downing: Do you remember being asked that question?

The Witness: Yes.

Q. (By Mr. Siciliano): Do you remember what you said yesterday? A. Yes.

Q. What did you say?

A. She told my mother-in-law if I joined the Union she was going to——

Trial Examiner Downing: She was going to what?

The Witness: You got me puzzled.

Q. (By Mr. Siciliano): Well, can you remember? What did [184] she tell you?

A. I think she said if we joined the Union, she was going to get better men.

Q. She said nothing else?

A. That is all she told me.

Q. Is that what you said yesterday, Eddie?

(Testimony of Edward Ejadian.)

A. I don't remember, maybe I did, maybe I didn't.

Q. But you remember what you said yesterday?

Trial Examiner Downing: He has already testified to that.

Mr. Siciliano: Mr. Examiner, we are just trying——

Trial Examiner Downing: He was asked on Cross-Examination if he remembered what he said yesterday, and he said "No." I think this is proper Redirect Examination.

Q. (By Mr. Siciliano): Do you remember what you said yesterday to us here downstairs?

A. Yes, sir.

Q. What did you say then?

Mr. Thomas: If Your Honor please, what is the purpose of this? If he is going to impeach the witness——

Mr. Siciliano: No.

Mr. Bamford: If Respondent's counsel is going to object, may the witness be excused so we can argue this out without his presence?

Trial Examiner Downing: If there is an objection, I [185] will overrule it.

Do you remember what you said yesterday from the witness stand with reference to what your mother-in-law told you? Was it the same as you have said this morning or was it something different?

The Witness: I can't remember it. [186]

Mr. Thomas: If Your Honor please, at this time I would like to move that the testimony of Eddie Ejadian, which he gave yesterday in connection with the refreshing of his memory, be stricken from the record, because it is shown here today that there was no such recollection or refreshing of his memory since he can't remember from one day to the next what he testified to. [187]

* * *

LOUISE MOSESIAN

recalled as a witness by and on behalf of the Respondent, having been previously sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Thomas:

Q. Are you an officer of the State Center Warehouse and Cold Storage Company?

A. Yes, sir, I am.

Q. What is your title? A. Secretary.

* * *

Q. Who did the firing and hiring of your warehouse employees during the period of November '48 to April '49? A. My mother is the boss.

Trial Examiner Downing: That doesn't quite answer it. The question was, who does the hiring and firing?

The Witness: My mother does, and, if she isn't there, we do it, Mary and I do it.

Q. (By Mr. Thomas): Have you actually fired anyone?

(Testimony of Louise Mosesian.)

A. No, sir, not directly without consulting Mrs. Mosesian.

Q. Your mother? A. Yes.

Trial Examiner Downing: The question I would like to ask, before you pass on, is: When your mother isn't there, who is the boss?

The Witness: Either Mary or I.

Trial Examiner Downing: Suppose you are both there. Which of you is the boss?

The Witness: It depends. When she starts something, I never interfere. When I start something, she never interferes.

Trial Examiner Downing: Who takes the first action? [193] It depends upon who takes the first action in the matter?

The Witness: Yes, and then we consult, and whoever got on the subject first, she does the talking.

Trial Examiner Downing: All right, proceed.

Q. (By Mr. Thomas): Actually, you three women run Paul A. Mosesian and the State Center Warehouse?

A. Yes, sir. We have the last word.

Q. Were there any 'No Smoking' signs in the warehouse during the period of November, 1948, through April of '49?

A. Yes, sir. There has been 'No Smoking' signs in that warehouse since the time Mr. Nixon was there. That is about—over 30 years. There has always been 'No Smoking' signs on the pillars of that warehouse.

Q. And they have been there for 30 years?

(Testimony of Louise Mosesian.)

A. Yes, sir.

Q. And any other 'No Smoking' signs?

A. We always put 'No Smoking' signs all over the building, but the employees pull them down. I have a 'No Smoking' sign in the upstairs building where Paul Mosesian keeps paint thinner, and I have told the boys not to ever get near that paint thinner.

Mr. Siciliano: Mr. Examiner, I don't know if that is too responsive to the question. The question was originally about signs.

The Witness: Yes, there are signs in the building. From [194] time to time the men pull them down but they can't pull the signs down that have been stenciled on the pillars. But the other signs, they pull them down.

Trial Examiner Downing: How fresh are those stencils? Do you mean to tell me they are 30 years old?

The Witness: Yes, sir. Mr. W. C. Nixon, when the warehouse was first built in 1918, those signs are still there with his name on them, W. C. Nixon.

Trial Examiner Downing: Under the "No Smoking"?

The Witness: Yes, sir. There are pillars there and they are stenciled on there.

Trial Examiner Downing: But they have not been freshly stenciled there for 30 years?

The Witness: No, sir. They have been up there ever since I can remember. [195]

(Testimony of Louise Mosesian.)

Q. (By Mr. Thomas): Are you able to clearly read these stenciled signs? A. Yes, sir.

Q. What sort of ink are they?

A. They are stencil ink, that black ink.

Q. It is heavy black ink?

A. Heavy black ink. It is the only kind of ink the warehouse uses for stenciling. Regular stenciling.

Q. Are there any painted 'No Smoking' signs?

A. As you go down to cold storage, there is a little white painted spot, and there has been a 'No Smoking' sign for a long time, but somebody has crossed or done something with it.

Q. Crossed it with what?

A. Crossed it with chalk or something.

Trial Examiner Downing: When was it first put there?

The Witness: It has been there ever since I have been there.

Trial Examiner Downing: And when was it first marked over with chalk or something else?

The Witness: That was marked over—I don't remember the exact date, but somebody has just crossed it.

Trial Examiner Downing: Well, the date is somewhat important, you know, with reference to Machoian's employment. [196]

The Witness: Somebody has crossed that out.

Trial Examiner Downing: I know, but when was that done? How long ago was that done?

(Testimony of Louise Mosesian.)

The Witness: It was before the election. The sign was all right until after the election. Somebody just went and put some crosses on it.

Trial Examiner Downing: After the election, it was crossed?

The Witness: Yes.

Q. (By Mr. Thomas): By marking the sign or crossing it out? What do you mean?

A. It says "No Smoking," and somebody has put a big cross like this across it.

Q. The sign is perfectly legible, however?

A. Yes, sir.

Q. Do you know Moses Machoian?

A. I know him from the warehouse, yes, sir.

Q. Did he work for the State Center Warehouse? A. Yes, sir.

Q. Who employed Moses Machoian?

A. My mother.

Q. Do you remember the circumstances of his employment? A. Well, he——

Q. I haven't asked you that. Do you remember?

A. Yes.

Q. Where was he employed? [197]

A. In our home.

Q. At? A. 1146 "R" Street.

Q. Who was present at the time Machoian was employed?

A. His wife. I presume it was his wife. There was a lady with him. And Harry Ekzoozian and Harry's wife, and my mother and I.

Q. Who brought Machoian to your home?

(Testimony of Louise Mosesian.)

A. Harry Ekzoozian.

Q. Tell us in your own words what was said by the various parties present at the time of his employment? Relative to his employment?

A. Well, Harry brought Machoian over and Harry said that Machoian went to him and wanted a job. So he brought Machoian and his wife, and they came over to the house and we were sitting—it was quite warm. It was a warm day. We were all sitting on the back service porch. And Machoian said that he had nothing to do and wanted a job. So mother told him, “Well, when I hire anybody, I usually want somebody to stay all the time, because it causes a lot of headaches for somebody to learn the stock and then, if you break someone in and they get up and go, then it just means we have to break someone else in.”

He said that he had a steady job every year some place, some packing house, and from what I understood it was a raisin-packing [198] house, and he said he just wanted it temporarily.

And his wife told me that this man, her husband, she said, “Please tell her to please give him a job, because when he gets out of bed in the morning, he goes to the coffee houses and plays cards all day and comes home all of the early hours of the morning.” [199]

* * *

Q. Did your mother mention smoking to Mr. Machoian?

A. Yes, sir. She told him that there was no smoking in the building, in the warehouse, because

(Testimony of Louise Mosesian.)

the merchandise in there belonged to everybody and we did not carry insurance on it; whoever put the merchandise there, carried their own insurance and she didn't want any trouble; positively no smoking in the building.

Q. Was anything else said at that time relative to his employment?

A. Well, he said that he would report to work Monday, the following Monday, but he didn't report to work, and then—— [200]

* * *

Q. (By Mr. Thomas): When did you talk to Mr. Machoian?

A. I have talked to him on several occasions. You mean one particular incident? Is that what you want me to tell you about?

Q. About when was the first time?

A. After the packing house season, when I came back from the packing house.

Q. Which would be about when?

A. That was about in December. I came back because the packing house closed November 13th and I stayed out there a couple of weeks, by the time I closed everything up. I used [202] to check the warehouse in the morning and look at the wires and the mail, and then go out.

Trial Examiner Downing: Let's not go into that.

The Witness: About December.

Q. (By Mr. Thomas): That was the first time you had a conversation with him? A. Yes.

Q. Was anyone else present?

(Testimony of Louise Mosesian.)

A. Yes, sir. Harry Ekzoozian.

Q. Do you recall where in the warehouse?

A. In the big room near the elevator.

Trial Examiner Downing: What floor?

The Witness: We have a basement on the first floor, sir.

Q. (By Mr. Thomas): Not the basement?

A. No, sir, not the basement.

Q. Will you please tell us what happened.

A. Working in the office, all at once some music bursted forth just as loud as you can possibly——

Trial Examiner Downing: You mean a musical instrument?

The Witness: No, a voice, singing very loudly in the Turkish language, singing on top of his lungs, and I went out there and I said, "What do you think this is? A place of work, or is this a wedding?"

And he was singing just on the top of his voice and just [203] like, you know, snapping your fingers. He was jumping around.

And I said, "What the heck goes on here anyway? We can't concentrate in the office. This is no place to sing."

Trial Examiner Downing: Do you understand Turkish?

The Witness: No, sir, but I know what it is.

Trial Examiner Downing: Did you know what song he was singing?

The Witness: No, sir. He was singing just as loud as he possibly could, at the top of his voice.

(Testimony of Louise Mosesian.)

Q. (By Mr. Thomas): What was Harry Ek-zoozian doing while Mr. Machoian was singing?

A. Harry was stacking something. I don't know what he was doing. I just went right up to him, and I gave him "holy Pat." "What is this you are doing around here? We are trying to work in the office. You are bursting forth with loud singing."

Q. Did you tell your mother about this?

A. Yes, sir, I did.

Q. Was there any other occasion when you talked to Mr. Machoian about his singing and dancing?

A. Several times after that, he bursted forth with his loud—— [204]

* * *

Q. (By Mr. Thomas): Was there any other occasion when you talked to Mr. Machoian about his singing and dancing and loud talking?

A. Yes, sir, I did. This man—— [206]

Q. Wait a minute. Do you recall about when that was?

A. It was around about the first of the year. He was working alone and singing to himself again.

Trial Examiner Downing: Where were you?

The Witness: In the building.

Trial Examiner Downing: In the office of the warehouse?

The Witness: I was in the warehouse.

Trial Examiner Downing: How did you happen to hear him?

(Testimony of Louise Mosesian.)

The Witness: Because I went into the warehouse. We have a room where we store papers and past records and things.

Trial Examiner Downing: But you didn't hear him from the office?

The Witness: No, I didn't hear him from the office. I was going to the wire room in the back, where we usually keep some cancelled checks and papers and things, and I heard him singing again and I said, "Hey there, quit it. How many times do I have to tell you?"

Trial Examiner Downing: He was singing while he worked?

The Witness: Yes, sir.

Trial Examiner Downing: Singing to himself?

The Witness: Well, he was singing quite loudly, sir.

Q. (By Mr. Thomas): Did you tell your mother about these subsequent occasions?

A. Yes, sir, I told her. [207]

* * *

Trial Examiner Downing: I think counsel is trying to avoid leading. I will ask the question.

Do you recall any incident where you went into the boxcar and made some reference to the group of men there to a letter which you had from the Labor Board?

The Witness: No, sir. I went to a boxcar, but I never said anything about a letter. No, sir, that is wrong.

(Testimony of Louise Mosesian.)

Q. (By Mr. Thomas): Do you remember why you went to that boxcar?

A. It was after lunch hour one day. It was around the first. It was around the holidays. I had come back from the packing house and something had happened in the boxcar. I couldn't figure what it was. These men were always arguing among themselves. There was a big pow-wow going on all the time.

Trial Examiner Downing: Can you fix the time?

The Witness: Around the first part of the year. I came back after lunch—it was about 1:15 one day—and I heard these men having a——

Trial Examiner Downing: I am not sure that is going to reach the incident you are interested in, is it, Mr. Thomas, around the first of the year?

Mr. Thomas: That is the only one that we are familiar with, Your Honor.

Trial Examiner Downing: All right, proceed.

* * *

Q. (By Mr. Thomas): Who was present in the boxcar? A. The boys of the warehouse.

Q. Who were they?

A. Machoian and Harry and Eddie and I don't know whether Bob was there or not. There was a fellow by the name of Bob Krikorian. There were just three or four of them in the car.

Mr. Thomas: Mr. Reporter, would you read back the place where she stopped in her testimony?

Trial Examiner Downing: Where she said there

(Testimony of Louise Mosesian.)

was a big pow-wow going on in there and she walked in and told what she said.

(Record read.)

Q. (By Mr. Thomas): Now will you tell us what you said?

A. I said, "What goes on there, fellows? It is a quarter after 1:00, 20 after 1:00, right after lunch hour. What is the [212] argument about?"

And when I went in there, Machoian's voice was louder than the rest of them, and I said, "Get to work. What the heck is it? If you fellows don't want to work, you better go on home. Wait until I tell the Old Lady on you."

Trial Examiner Downing: Did anyone say anything in reply?

The Witness: The argument was between Machoian and Harry Ekzoozian. They didn't tell me what the argument was. I just stepped in the car, told them that, and moved on.

Mr. Bamford: I move that the whole boxcar incident be stricken as irrelevant.

Trial Examiner Downing: Granted.

Mr. Thomas: If Your Honor please, I believe in the testimony that was given by Machoian it is only his contention that she had received the letter and had mentioned it at the time.

Trial Examiner Downing: That is right. But she is testifying to an incident that occurred earlier in January. That obviously couldn't have been the same incident and, the way she testifies to it, it

(Testimony of Louise Mosesian.)

doesn't seem to be relevant to any of the issues here.

Mr. Thomas: Well, maybe it will be, if I ask her the next question, did she at any time subsequent to this incident have any other meeting in the boxcar with the men.

Trial Examiner Downing: I thought your position was, a while back, that the incident she is testifying to is the only [213] boxcar incident.

Mr. Thomas: The only way I can prove that is to ask if there was any other boxcar incident.

Trial Examiner Downing: I will permit the question to be put.

Mr. Bamford: Will you read the question, please?

Trial Examiner Downing: It hasn't been put yet. I will permit it.

Mr. Thomas: I am sorry. I thought you said you wouldn't.

Trial Examiner Downing: I will permit it to be put.

Q. (By Mr. Thomas): Was there any other boxcar incident outside of this one that you have testified to? A. I——

Mr. Bamford: Just a moment.

Trial Examiner Downing: Just a moment.

Mr. Bamford: I am going to object to the way that question is put. If counsel wishes to ask whether there was any discussion in the boxcar regarding Union activities and membership, very well and good.

Trial Examiner Downing: The first answer to

(Testimony of Louise Mosesian.)

the question will be yes or no. Your objection will be premature until the follow-up question is put.

Was there any other incident in the boxcar, involving Machoian?

The Witness: We had strict instructions from Bob Franklin [214] not to talk to any of the men.

Trial Examiner Downing: That doesn't answer the question. The question is, was there any other incident in the boxcar——

The Witness: No, sir.

Trial Examiner Downing: ——involving Moses Machoian?

The Witness: No, sir; there wasn't.

Mr. Bamford: Mr. Examiner, I move to have the Bob Franklin answer stricken.

Trial Examiner Downing: May I hear the Bob Franklin statement?

(Record read).

Trial Examiner Downing: Motion denied.

Mr. Bamford: Mr. Examiner, I suggest for the sake of the reporter we take a five-minute recess.

Trial Examiner Downing: Take a ten-minute recess.

(Recess had.)

Trial Examiner Downing: The hearing will be in order.

Q. (By Mr. Thomas): Did you mention Machoian's Union activities at that time?

A. No, sir.

Trial Examiner Downing: At which time?

Mr. Thomas: At the time of the boxcar. She has

(Testimony of Louise Mosesian.)

testified that there was only one boxcar incident, Your Honor.

Q. (By Mr. Thomas): Did you mention Machoian's Union activities during this boxcar incident?

A. No, sir.

Q. Did you mention Mr. Sohigian?

A. No, sir.

Mr. Bamford: Mr. Examiner, we are willing to stipulate that. Her testimony has been that it occurred before any Union activity took place.

Trial Examiner Downing: Not necessarily. She said around the first of the year. That is as definitely as she has fixed it.

Q. (By Mr. Thomas): Did you ever discuss the Union or Union activities with Mr. Machoian at any time? A. No, sir.

Q. Did you ever warn Mr. Machoian about smoking in the warehouse? A. Yes, sir.

Q. Would you please tell the Court on what occasions and who was present?

Trial Examiner Downing: Tell us the first time you warned him.

The Witness: I warned him right after I came back from the packing house, which was the latter part of—around December. I warned him several times in December and in January. I told him positively no smoking in the building. I don't smoke, I am allergic to—— [216]

* * *

Q. Was anyone else present when Harry complained about Machoian's work?

(Testimony of Louise Mosesian.)

A. No, sir. Harry told me that directly. [221]

Q. Will you please tell the Court directly——

Mr. Bamford: May we have the time, the place?

Mr. Thomas: Pardon me.

Q. Do you recall when this occurred?

A. It occurred—it was before the election, because he kept telling me that this man had a sore finger and he was carrying all the load. When they were throwing sacks, his middle finger was sore and he was dropping all the weight on Harry.

Mr. Bamford: I move to strike that answer as immaterial, Mr. Examiner.

Trial Examiner Downing: Overruled.

Mr. Bamford: May I have a continuing objection to all questions and answers pertaining to Machoian's work, except for smoking, singing and dancing?

Trial Examiner Downing: That isn't in line with the issue tendered by the Answer as amended. The Answer is broader than that. I suggest you make your objections as the questions are put.

Did you tell your mother that Harry had complained about Machoian's sore finger?

The Witness: Yes. I told her. I am sure I told her, yes, sir. [222]

* * *

Q. (By Mr. Thomas): Did you know that Machoian was interested in a Union during the period of his employment? A. No, sir.

Q. Did you know he was carrying on any Union activities?

A. No, sir, I didn't know anything.

(Testimony of Louise Mosesian.)

Q. Did you make any attempt to find out?

A. No, sir.

Q. When did you first learn that the "Teamsters' Union was interested in organizing the plant?

A. Bob Franklin came to us, telephoned our home and said that Mr. McDonald had called him, a Mr. McDonald. I don't know who he is. He said he wanted to see us.

Trial Examiner Downing: How long was that before you got the letter?

The Witness: That was about 10 days, something like that, 10 days or two weeks. I don't remember exactly.

Q. (By Mr. Thomas): Did Mr. Franklin come to see you? A. Yes, sir, he did.

Q. What did he tell you? [223]

A. He said that this Mr. McDonald had said that the boys had joined the Union and we had to have a contract with them, and Franklin said, "If you folks don't want a contract, we have to call an election."

Trial Examiner Downing: Mr. Thomas, wasn't this discussed when this witness was on the stand for General Counsel?

Mr. Bamford: Counsel has spoken to me about this. We are both uncertain as to the exact extent of her testimony yesterday, and I said it was perfectly all right for him to go ahead.

Trial Examiner Downing: All right, proceed.

Mr. Thomas: Will you read the last there, where she was interrupted?

(Testimony of Louise Mosesian.)

(Record read.)

Q. (By Mr. Thomas): Did he say anything else?

A. And he gave instructions to us not to discuss anything with the men. He said it was a law, you are not supposed to talk to any of the men. He said if there was anything, to take it up with him.

* * *

Q. Yes, but we are not after an exact figure. We just want your best approximation. Was it one time, five times, ten times?

A. Well, it happens. After all, it is a warehouse. It happens. Things disappear out of it.

Q. To your knowledge, did you or any other officer of the corporation ever speak to Ejadian about this matter? A. About who?

Mr. Thomas: Wait a minute. We haven't accused Mr. Ejadian of pilfering. The only thing that has been testified to was the suspicion that he may have and, therefore, the key was taken from him.

Trial Examiner Downing: I will permit the examination to proceed. I will overrule the objection.

The question was brought up whether she ever spoke to Ejadian about it.

Cross-Examination

By Mr. Bamford:

Q. Did you or any of your family ever speak to Ejadian about this incident occurring in the morning?

(Testimony of Louise Mosesian.)

A. No, sir. Bob Franklin told us not to discuss it. It [234-237] was his business. That was his work, not to discuss it.

Q. Well, I am interested in why you decided to keep an employee whose honesty you say you have reason to doubt and in the face of repeated pilfering from your warehouse, why did you do that?

A. Well, Bob Franklin at that time told us if we let the man go and told them it was for taking something out then this fellow can turn around and sue you; he said, "Just leave it alone. Just let the matter rest. I will take care of it. Just drop the subject."

Trial Examiner Downing: Did he say how he would take care of it?

The Witness: He said, "Let me take care of it."

Trial Examiner Downing: How did he take care of it?

The Witness: Well, he didn't take care of it. He went out of the picture, and Mr. Thomas came into the picture. [238]

* * *

AGNES AZIDIGIAN

a witness called on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bamford:

Q. Will you state your name and address for the record, please? A. Agnes Azidigian.

(Testimony of Agnes Azidigian.)

Trial Examiner Downing: Your address?

The Witness: 2426 Mono.

Q. (By Mr. Bamford): Do you work for Mrs. Mosesian? Work for her as a housekeeper?

A. Yes.

Q. How long have you been doing this work?

A. It is over five years.

Q. Is Eddy Ejadian your son-in-law?

A. Yes.

Q. Did Mrs. Mosesian ever speak to you about the Union coming into Center Warehouse?

A. No. [240]

Q. Did you understand that question?

A. Yes, I understand.

Q. Did she ever speak to you about Eddie's job at the warehouse?

A. She told me if Eddie belonged to Union, she don't keep him—like these workers, better workers.

Trial Examiner Downing: Now tell us again what Mrs. Mosesian said.

The Witness: "If warehouse belong Union, I don't keep these workers, I don't keep like these workers—better workers."

Q. (By Mr. Bamford): When was this, do you remember?

A. Around, I think, May or June.

Q. In what year? A. 1949.

Q. How did it come up? How did the talk come up?

A. Oh, I was doing the housework, and she told me, that is all.

(Testimony of Agnes Azidigian.)

Q. How did the subject come up? Did she just say that?

A. She just said it. That is all. Nothing else.

Q. What had you been talking about at the time?

A. She said that to me so I can tell my son-in-law.

Q. She told you to tell your son-in-law?

A. Yes.

Trial Examiner Downing: Did she tell you to tell Eddie [241] that?

The Witness: Yes.

Trial Examiner Downing: She did?

The Witness: Yes.

Trial Examiner Downing: What did she say about telling Eddie?

The Witness: That is what I was saying, the same thing she says. Nothing else she said to me.

Trial Examiner Downing: Did she tell you to go and tell Eddie that?

The Witness: Yes.

Trial Examiner Downing: Did you tell him?

The Witness: Yes. I tell him.

Trial Examiner Downing: When?

The Witness: When? I don't remember when.

Trial Examiner Downing: Was it the same day or later?

The Witness: Later. Pretty late I told him.

Trial Examiner Downing: How much later?

The Witness: I can't remember that. [242]

(Testimony of Agnes Azidigian.)

Trial Examiner Downing: I should like to ask one question before cross-examination.

Did Mrs. Mosesian give you any message to Moses Machoian?

The Witness: No.

Trial Examiner Downing: Only to Eddie?

The Witness: Only Eddie.

Trial Examiner Downing: Did she mention Moses Machoian, when she was talking about Eddie and the Union in the warehouse?

The Witness: No.

Trial Examiner Downing: You may cross-examine. [244]

* * *

Cross-Examination

By Mr. Thomas:

Q. Do you remember the day that you—what you were doing when she talked to you about Eddie or about the Union?

A. I was in the diningroom, I think, cleaning carpets, see. She was sitting down on a couch, when she told me, the diningroom couch.

Q. She definitely told you to tell your son what she said? A. Yes.

Q. Your son-in-law? A. Yes.

Trial Examiner Downing: You will have to speak, so the Reporter can't get the nod of a head. You will have to say yes or no.

The Witness: Yes.

(Testimony of Agnes Azidigian.)

Q. (By Mr. Thomas): She just didn't make a statement and ask you a question? A. No.

Q. Didn't she say to you, "What would you do, if you were in my case?"

A. No, she didn't say nothing; she didn't say nothing.

Q. She gave you a direct message to take to Eddie? A. Yes, that is all she says.

Q. And this occurred in May or June of [245] 1949? A. Yes.

Q. Are you sure of that?

A. Yes, I am pretty sure.

* * *

Q. Why do you say that this conversation took place in May or June of 1949?

A. She says that about that time, see, I can tell him.

Q. What makes you remember it occurred in May or June of 1949?

A. Because my boy graduated from high school that time and I remember then.

Q. I see. And it was while the graduating exercises were going on? A. Yes.

Q. Do you know the exact date when your boy graduated? A. June 11th. [246]

* * *

Q. It was around the graduation day?

A. Yes, right around.

Q. What were the exact words that Mrs. Mosesian said?

(Testimony of Agnes Azidigian.)

A. "If warehouse become Union, I don't keep like these workers—better workers."

Q. She didn't mention Edward's name?

A. No, she didn't mention.

Q. But she did tell you to tell Edward?

A. Yes.

Q. Is that the only statement Mrs. Mosesian made to you? A. That is all she said. [247]

Q. When Mrs. Mosesian was talking to you, was her statement that if the warehouse goes Union she would get better workers? A. Yes.

Q. She did not say that if Eddie joins the Union he will lose his job? A. No, no. [248]

* * *

LOUISE MOSESIAN

resumed the stand, and was examined and testified further as follows:

Cross-Examination

(Continued) [276]

* * *

The Witness: He wants to know how many signs were put up after Machoian left, is that it?

Trial Examiner Downing: You are answering a question that you did not finish.

The Witness: Yes, but what was the question?

Mr. Bamford: Will you read the last question and answer, please?

(The last question and answer was read back by the Reporter).

(Testimony of Louise Mosesian.)

The Witness: We put up extra signs after Machoian left, because we had a terrific fire on the ranch. We had a big apartment house burned down on the ranch, an employee's apartment house. It cost in the neighborhood of eight or ten thousand dollars. The employees left a cigarette and the whole thing came down in ashes. [285]

Q. (By Mr. Bamford): Where was this?

A. Fresno Vineyard Ranch.

Q. When?

A. 1949, about 1949. We had a terrific fire out there. In fact, we have had a terrific fire on our Lindsey Ranch. One of our big apartment houses burned down on account of a cigarette.

Q. When was that?

A. That was in '47 I think it was '47.

Q. But where was the other one you say burned in '49? A. The Lindsey Ranch.

Q. The one in '49?

A. Fresno Vineyard Ranch, right across the street from a packing house. We couldn't get any decent insurance out of the thing at the time, either.

Mr. Bamford: Counsel are willing to stipulate that the apartment house in the Fresno Vineyard Ranch burned down in 1949—in July, 1949?

* * *

Q. (By Mr. Bamford): And you put up these new signs after [286] this fire?

A. We have always had extra signs like that in the office.

Q. But you said that you talked about putting

(Testimony of Louise Mosesian.)

up a lot of extra signs after Machoian was fired?

A. Well, that is when this fire took place. After that, we put some signs up. I can't remember how many. [287]

* * *

Q. Isn't it a fact that your own manager, Mr. Justice, smokes regularly in the warehouse?

A. I don't know. I don't follow him around the warehouse, but every man knows before he is hired that he is not supposed to smoke in that building.

Q. Have you ever seen Mr. Justice smoke in the building? A. I have seen him bite a pipe.

Q. Have you ever seen him smoke, not bite a pipe?

A. Yes, I have seen him in the office.

Q. In the warehouse?

A. I don't follow him around in the warehouse. I have my work to do.

Q. Well, you have testified that you caught Moses Machoian many times smoking in the warehouse. Now, did you [289] follow him around?

A. No, but I go in the building to bring records from upstairs, or records from downstairs. I look around to see what the men were doing. After all, I am paid to see what is going on.

Q. Were you following Machoian around?

A. No, I was not following Machoian around.

Q. But do you go in the building very often?

A. I go in often.

Q. And you have never seen Mr. Justice smoke in the warehouse?

(Testimony of Louise Mosesian.)

A. I have seen him bite a cigar. He has a habit. He puts a cigar in his mouth and he chews on it, but as a rule he doesn't light it.

Q. Well, he does sometimes though?

A. He does sometimes.

Q. And he smokes in the warehouse?

A. I haven't seen him. I know he bites the cigar, but I don't know if he is smoking.

Q. Did he bite a pipe?

A. I have seen him bite a pipe for hours and hours with nothing in it.

Q. That may be. Did you ever see him smoking a pipe in the warehouse?

A. I have seen him smoking in the office, but I have [290] not seen him smoking in the warehouse. I haven't followed him enough to know that he smokes.

Q. But you followed Machoian enough to know that he smokes?

A. No, sir, I just walked in on Machoian and saw him smoke, and I told these men time and time again that they can't smoke in the building.

* * *

Q. (By Mr. Bamford): Now, to go back to the period when Moses Machoian was working in the warehouse, you say that you cautioned him several times against smoking?

A. Yes, sir, I did.

Q. And that was in the face of "No Smoking" signs, which were stencilled?

(Testimony of Louise Mosesian.)

A. Yes, sir. He knew that he wasn't supposed to smoke, because the day we hired him, my mother told him, "No smoking in the building. There is no smoking," and everyone—every man is told that before they come in that warehouse. There [291] are sacks and cartons, and everything else in there, and I have seen too many fires in our business. I have worked for 25 years and I have seen some terrific fires on our ranches. I have seen a great big tank house burn down.

* * *

Q. (By Mr. Bamford): Does your mother smoke? A. Occasionally.

Q. Did you ever see her smoke in the warehouse? A. I don't follow my mother around.

Mr. Thomas: Just a moment. If your Honor please, what Mrs. Mosesian does as an employer, it is her responsibility, it is her warehouse, and if she burns it down it is her responsibility, but if her employees who are working in the stacks are told not to smoke, what she does is absolutely nothing in connection with what the employees are supposed to do.

Trial Examiner Downing: It would be relevant on the question of whether the rule against no smoking was promulgated in good faith and was intended to be obeyed. I will overrule the objection.

Mr. Bamford: Will counsel stipulate that Mrs. Mosesian regularly smoked in the warehouse?

Mr. Thomas: I wouldn't stipulate to that fact,

(Testimony of Louise Mosesian.)

because it isn't true. Your Honor, I don't understand [292] why when your men are working around your sacks, there can be any question of whether or not the ruling with regard to your employees is the same as with regard to Mrs. Mosesian, who never lifts a sack.

Trial Examiner Downing: It is a question of whether the rule was actually in existence and whether it was a bona fide rule, and was intended to be observed.

Mr. Thomas: I don't see what Mrs. Mosesian's doing has anything to do with that.

Trial Examiner Downing: The objection will be overruled.

Q. (By Mr. Bamford): Did you ever see your mother smoke in the warehouse, Miss Mosesian?

A. I know she smoked, but I don't know whether she smoked in the warehouse or not.

Trial Examiner Downing: What does she smoke, cigarettes?

The Witness: Yes, sir. She doesn't smoke very much, just an occasional cigarette.

Q. (By Mr. Bamford): But you have never seen her smoke in the warehouse?

A. I have never followed her around to see if she smokes in the building or not, but I know that she comes and sits in the office and smokes a cigarette. [293]

(Testimony of Louise Mosesian.)

Q. To go back to the "No Smoking" signs, Miss Mosesian——

A. Yes, sir.

Q. ——I am trying to get an answer from you as to whether you can say of your own knowledge whether or not there were any "No Smoking" signs, apart from the stencil signs, in the warehouse, at the time Machoian worked there?

A. Our office—I mean the front office where I work, right out the door where the old bookkeeper used to sit for many years, right out that door is where we have all kinds of Paul Mosesian records and warehouse records and that is where we keep all our stationery and all our papers and everything else. That sign has been on that door, well, since the war. We used to have a lot of soldiers. The Government used to store a lot of stuff in that warehouse and they used to work in that middle warehouse. The Government used to put in stuff and take it out and put it in and take it out, and those soldiers used to come and unload and do the work, and that sign on that door right by [294] Joe Chambille's desk, former Joe Chambille, that sign has been there since the war. It is a big "No Smoking" sign.

Trial Examiner Downing: Was it ever pulled down?

The Witness: I don't know if it ever was pulled down. As far as I know, it is the same sign.

Q. (By Mr. Bamford): Then you can say positively that that sign was there during the time that——

(Testimony of Louise Mosesian.)

A. That sign has always been there. We have our records and everything there, and if anything happened there—the Internal Revenue comes in and checks those records from time to time—where would we stand?

Q. That sign?

A. That sign has always been there.

Q. Do you know of any other signs that have always been there and would include the period that Machoian was working there?

A. I have a sign upstairs that has always been there and has been pulled down from time to time. It is a department where we keep private things like shovels, and hoes, and packing house scales, and what have you, things that people can pick out and go with. I keep that under lock and key and we have some paint thinner there, and I have that right above the door so that they don't smoke around this paint thinner. [295]

Q. Do I gather from that answer that there are only certain places in the warehouse you are not supposed to smoke?

A. You asked me what signs have always been there.

Q. Well, I gather from your answer that they can smoke some places and not in others?

A. Not in that warehouse. They are not supposed to smoke.

Q. And that sign has been there?

A. Well, it has been pulled down from time to time, but on account of that paint thinner, I have

(Testimony of Louise Mosesian.)

always tried to replace it as fast as I can. I have given the men 'holy pat' and they know they are not supposed to smoke in that building.

Q. Do you know the last time that that sign was pulled down? A. No, I don't know.

Q. Do you know if it was ever pulled down during the time that Moses Machoian was there?

A. No, I don't remember that.

Q. But you can say positively that there were at least some "No Smoking" signs up?

A. There were some "No Smoking" signs in the building when Moses Machoian was there. He knows that.

Q. Now, do you remember being interviewed on this case by Mrs. Phoenix, the Examiner here present? A. Yes. [296]

* * *

Q. (By Mr. Bamford): When was the first occasion on which you reprimanded him?

A. After I came back from the packing house.

Q. About which month? A. In December.

Q. The first part or latter part?

A. I didn't keep a record of it. I told you I didn't keep a record of anything. [323]

Q. But you testified this morning that it was the latter part of December but you don't know now?

A. It was after I came back from the packing house in December.

Q. Yes, and where did this reprimand take place? A. In the building.

(Testimony of Louise Mosesian.)

Q. What part of the building?

A. The center of the building.

Trial Examiner Downing: What floor?

The Witness: First floor.

Q. (By Mr. Bamford): What time of day was it?

A. I didn't keep track of the time of the day.

Q. Morning or afternoon?

A. I don't remember.

Q. Who was present? A. Machoian.

Q. Anyone else?

A. I was there, of course, and Harry Ekzoozian.

Q. Anyone else?

A. I don't remember of anyone else being there.

Q. Now, on other occasions beyond this, you warned Machoian about smoking, after you had caught him smoking, is that correct?

A. Yes. I told him not to smoke.

Q. And on each of these occasions did you actually see him [324] smoking or did you smell the smoke? A. I saw him smoking.

Q. You actually saw him smoking each time?

A. Yes, sir. I saw this man smoking. As soon as I would go up to him, he would take the cigarette and he would hide it like this in his hand, and I actually opened his hand and took the cigarette out of his hand.

Q. Each time?

A. On one special occasion I pulled the cigarette out of his hand.

(Testimony of Louise Mosesian.)

Q. But only on one occasion? A. Yes.

Trial Examiner Downing: Was it lit?

The Witness: Yes, sir, it was lit.

Q. (By Mr. Bamford): On the other occasions, did you actually see the lighted cigarette?

A. I didn't see him light the cigarette. I saw him smoking a cigarette.

Q. Yes.

A. And I saw him take a cigarette, put it on the floor, and rub it out, when he saw me coming.

Q. Now, how many times altogether would you say that you saw Machoian smoking and you reprimanded him?

A. On several occasions. I didn't keep track of it.

Q. Could you give us an approximation? "Several" might mean [325] anywhere from two to fifty, I gather. A. That is right.

Q. Could you get it closer? Was it five, ten, three? A. At least a half dozen times.

Q. At least a half dozen times?

A. At least a half dozen times.

Trial Examiner Downing: And the first time was in December. When was the last time?

The Witness: I don't remember, sir.

Q. (By Mr. Bamford): Was it before the election or after the election?

A. It was after the election.

Q. That was the last time, is that right?

A. Yes, sir.

(Testimony of Louise Mosesian.)

Q. Did you see him smoking on the day he was fired?

A. No, sir. I didn't see him the day he was fired.

Q. Did you see him smoking in the week before he was fired? A. I can't remember.

Q. Now, I believe you said this morning that every time that you caught Machoian smoking, Ekzoozian was with him, is that correct?

A. I didn't say that. I didn't mean it that way, anyway.

Q. Well, was he usually with him?

A. Well, Ekzoozian was his partner.

Q. Was he usually with him? [326]

A. Usually, yes, sir.

Q. So that would you say that on at least four occasions you reprimanded him in front of Ekzoozian, is that right?

A. I wouldn't say how many times but Harry was there on several occasions. I didn't keep a record of this. I didn't know this was all coming up.

Q. We are just trying to find out what your best memory is.

A. Yes, but I didn't keep a record of all this. I didn't know. Heavens!

Q. Well, you said that—I don't want to seem to be arguing with you but I am just trying to find out how many times Ekzoozian was present when you reprimanded him.

A. I didn't keep a record of it, sir.

Q. Would you say that it was at least three times?

(Testimony of Louise Mosesian.)

A. Well, I couldn't say anything. It was on several occasions. You know, when you are working in an office and concentrating and trying to write wires and code and everything else and have to go through the building to bring papers from the wire room and this and that, why every time I saw a cigarette, I saw red. [327]

Trial Examiner Downing: There were "No Smoking" signs. The record can show that during the noon recess the Trial Examiner made an inspection of the premises in the presence of counsel for the parties and that there were a number of [330] "No Smoking" signs stencilled on the pillars, mainly at one end of the building, the north end, mainly at that end. At occasional other spots in the building there were also other stencilled signs.

There is testimony that Machoian worked all over the building. Now, what difference does it make if the signs were only at the north end? They were visible to anyone. [331]

* * *

Trial Examiner Downing: Well, the record, of course, doesn't show what I know, except to the extent that I stated on the record a moment ago. I stated that they were chiefly at the north end of the building.

Mr. Thomas: That is correct.

Trial Examiner Downing: There is an occasional stencilled sign at random places elsewhere but very few. There are not over one or two others.

* * *

(Testimony of Louise Mosesian.)

Q. (By Mr. Bamford): Now, on each occasion that you say Machoian smoked and you reprimanded him for it, did you tell your mother?

A. Yes, I told her. I told mother several times. I says, "I don't know what you are going to do. That fellow is going to burn the building down."

Q. Just on several occasions you told her?

A. Yes, I told her.

Q. Or on each occasion?

A. As a rule, when anything happens during the day in the warehouse or ranches, when we go home at night we discuss everything generally with her. It is customary in our house to discuss everything with our mother, everything that is important. She has to know what is going on all the time. [338]

* * *

Q. Well, when you told her that Machoian had been smoking, would you just tell that he had been smoking?

A. No. I said, "That fellow is going to burn the building down." I just wanted her to know what was happening out there.

Q. What would she say?

A. I wouldn't wait to hear what she said. I said, "That is the kind of fellow you hired in the warehouse."

Q. What would she say, when you told her that?

A. It was just a casual conversation. I would tell her, and walk away.

Q. I thought you said that you talked, sat down and talked, [339] about these matters.

(Testimony of Louise Mosesian.)

A. We talk about these things in general.

Q. But as soon as you said that, you walked away?

A. Well, after all, she hired him and I didn't have much to say about it.

Q. Did you ever discuss the possibility of Machoian's discharge with your mother?

A. No, sir, never discussed that. She is the boss. She does what she wants. We tell her what is happening. She makes the decision. We have nothing to say about it. [340]

* * *

Q. Yes, I understand that, but I thought that you testified earlier that before any decision was made, you and your sister and your mother talked it over.

A. Yes, we usually talk it over.

Q. But you never discussed the possibility of Machoian's discharge, is that true?

A. No, sir, not us three together.

Q. Well, did you and your sister discuss it together?

A. I have never discussed it with Mary. I don't remember discussing anything like that with Mary.

Q. Did you ever discuss it with your mother alone?

A. I just told her, "He is going to burn the warehouse down."

Q. But you didn't discuss the possibility of discharging him, is that correct?

A. That is up to her. She is the boss. I don't have anything to say.

(Testimony of Louise Mosesian.)

Q. Well, maybe the final decision is up to her, but did you discuss the possibility of discharging him?

A. I don't remember discussing the possibility of discharging him.

Trial Examiner Downing: Did you recommend it? [341]

The Witness: I certainly recommended it to myself.

Trial Examiner Downing: To your mother?

The Witness: I told her, "He is going to burn the warehouse down."

Trial Examiner Downing: That is as far as you went?

The Witness: That is as far as I went. I said she better do something about it.

Q. (By Mr. Bamford): What was that? You said that you told your mother she better do something about it, is that correct? A. Yes.

Q. But nothing was done, is that correct?

A. Well, it was up to her. I don't make her mind up. She makes her own mind up.

* * *

Redirect Examination

Trial Examiner Downing: Does Justice work with the men and as one of the members of a two-man team?

The Witness: No, sir. The greater portion of his work is done in the office.

(Testimony of Louise Mosesian.)

Trial Examiner Downing: In the office?

The Witness: Yes, sir.

Trial Examiner Downing: Does he supervise the men at all? [349]

The Witness: Well, he goes out and tells them——

Mr. Thomas: Mr. Examiner, will you ask the witness to talk so that we can hear, too?

Trial Examiner Downing: Yes, talk louder.

The Witness: What was that question again?

Trial Examiner Downing: Does he supervise the men at all, the warehousemen?

The Witness: Well, in case they are unloading a car, he takes the bill of lading and gives it to one of them and tells them, "Now, when you are unloading this car, be sure that all the quarts and pints are here," and tells them where to stack it, and tells them how to stack it, and comes back to the office.

Trial Examiner Downing: When he gives them orders, does he direct them on outgoing goods?

The Witness: Yes, he does part of the time, not all the time.

Trial Examiner Downing: They generally do work under his direction, don't they?

The Witness: Yes, sir.

* * *

Trial Examiner Downing: I got the impression, as I listened to your testimony, that you were the one who was [350] annoyed by Machoian's singing?

The Witness: Yes, sir.

(Testimony of Louise Mosesian.)

Trial Examiner Downing: The rest of the office force were not annoyed by it?

The Witness: I don't know whether the others were annoyed or not, but I know I went after him.

Trial Examiner Downing: I know. Let's talk about yourself. You were the one that complained about his singing?

The Witness: Yes, sir.

Trial Examiner Downing: No one else?

The Witness: I didn't listen to what anybody else had to say. I listened to myself.

Trial Examiner Downing: I asked you, when Machoian was [351] hired, he had a sore finger, and you said, "No."

The Witness: At the time that my mother hired him on the back porch, he didn't have a sore finger then.

Trial Examiner Downing: All right. That is what I'm asking you.

The Witness: No, sir, he didn't.

Trial Examiner Downing: Proceed, Mr. Bamford.

Mr. Bamford: I shall, sir.

Recross-Examination

By Mr. Bamford:

Q. Well, was Mr. Justice in fact the direct supervisor of those men?

A. What do you mean? He was the boss over them?

Q. Was he their boss?

(Testimony of Louise Mosesian.)

A. Well, yes and no. When Mary and I are there, we are the big boss. I mean he is under us.

Q. When you weren't there, he directed them?

A. Yes, sir.

Q. Who gave the men most of their orders, you or Mary or Mr. Justice?

A. We have an office girl that gives most of the orders.

Q. To the men?

A. Yes. We have a girl there that gives the orders out. Mr. Justice gives it mostly. He comes first.

Q. Can he recommend the hiring and discharge of these men?

A. Who? [352]

Q. Justice.

A. No, sir, we do the hiring and firing of the men.

Q. But does he have the power to effectively recommend their discharge or hiring?

A. No, sir.

Q. And he didn't have the power effectively to recommend hiring and firing, is that your testimony?

A. No. He doesn't have the power to recommend hiring and firing.

* * *

Trial Examiner Downing: That is what I got into, and I will permit the questions by either side. I had assumed that Justice was not only a foreman but a supervisor within the meaning of the Act. I would like to have each of you state your position

(Testimony of Louise Mosesian.)

on whether he is a supervisor or not within the meaning of the Act. What is your position, General Counsel?

Mr. Bamford: He is a supervisor, of course.

Trial Examiner Downing: What is your position, Mr. Thomas?

Mr. Thomas: What is the definition under the Act? Is it the same as under the Wage Hour Law?

Trial Examiner Downing: No.

Mr. Thomas: Is it more extensive or less? [353]

Trial Examiner Downing: More extensive. Section 2, Sub-section 11.

What is your position, Mr. Thomas?

Mr. Thomas: Well, I don't know what "responsibility to direct the men" means, your Honor. None of the other clauses under Section 11 apply to Mr. Justice in the operation of that plant. Now, regarding his "responsibility to direct the men" in the operation of the warehouse, of course, he has the responsibility of filling the orders, any order that comes in.

Trial Examiner Downing: Is he a warehouse manager? Is that his job?

The Witness: Yes.

Mr. Thomas: He is a warehouse manager with a limited authority, Mr. Examiner. I mean it is a peculiar circumstance and setup.

Trial Examiner Downing: What I do not understand is, if he isn't in charge of the warehouse crew, who is?

(Testimony of Louise Mosesian.)

Mr. Thomas: The Mosesians are.

Trial Examiner Downing: There are times when they are not there.

Mr. Thomas: But even when they are there, he doesn't have the right to hire, fire, recommend increases.

Trial Examiner Downing: Well, when the Mose-sians aren't there, it seems to me he is bound to be in charge of [354] them. If that isn't correct, I wish that you would set me straight and elucidate.

Mr. Thomas: Yes, he is in charge of them, but I don't know what would happen if they disobeyed his authority.

Trial Examiner Downing: That isn't enough to throw him outside the term of supervisor. If he responsibly directs them during any appreciable part of the time, I think the Board's decisions go far enough to hold him a supervisor within the meaning of the Act.

Incidentally, the General Counsel here may be able to recall the recent decision where—I think it is a Board decision—where a man was held to be a supervisor, although he performed his supervisory duties for only a very minor part of his time. Is that correct, gentlemen?

Mr. Siciliano: Yes.

Trial Examiner Downing: Do you know the name of the case?

Mr. Siciliano: I don't know the name of the case.

(Testimony of Louise Mosesian.)

Trial Examiner Downing: But there is one this last year, is there not?

Mr. Siciliano: That is correct, sir.

Mr. Thomas: I think under that restricted definition, he probably would come under that definition, because he does direct them in the filling of these orders. You understand by orders—— [355]

* * *

Mr. Thomas: Yes. What is the importance of whether Mr. Justice is a supervisor or not a supervisor?

Trial Examiner Downing: I don't think he is on that point now.

Mr. Bamford: Yes, I am, Mr. Examiner.

Trial Examiner Downing: Oh, you are?

Mr. Thomas: And I would like, if the Court would be pleased enough to advise me, to know why it is important.

Trial Examiner Downing: I think that it would be relevant on the question of why Mr. Justice didn't stop the smoking in the building. That is why I think it is important. The rules were there. He is bound to know them. Why [358] didn't he carry them out? Why didn't he enforce them? That is why I think it is important.

Mr. Thomas: Are you trying to show that these were within his powers, his rules?

Trial Examiner Downing: Not within his rules, but they were the rules of the plant and well known. Then why didn't Mr. Justice enforce them?

(Testimony of Louise Mosesian.)

Mr. Thomas: Because it wasn't his duty.

Trial Examiner Downing: It certainly is, if he is in charge of the warehouse. [359]

* * *

Trial Examiner Downing: Now, counsel proposes to refresh her memory, if possible, by reading this affidavit, and I will permit her to read it and see if it does refresh her memory. After she reads it, she can say whether it does or not.

Mr. Thomas: Very well, your Honor.

The Witness: You want me to read the whole thing?

Mr. Bamford: Just the first paragraph. Read the part that deals with Mr. Justice's authority in the plant.

Trial Examiner Downing: Does it refresh your memory?

The Witness: Yes, sir.

Trial Examiner Downing: Now that your memory is refreshed, do you wish to make any change in your testimony as to Justice's power to hire or fire employees?

Mr. Bamford: Or effectively recommend same.

Trial Examiner Downing: Or effectively recommend the hiring or firing.

The Witness: He can recommend, I presume.

Q. (By Mr. Bamford): That is, his recommendation would be effective?

A. Yes, he can recommend.

(Testimony of Louise Mosesian.)

Trial Examiner Downing: What was the next question?

Q. (By Mr. Bamford): And would that recommendation be effective?

A. It would depend upon what mother would say. [363]

Trial Examiner Downing: Would they be listened to? Would they be given weight?

The Witness: Yes, sir, I suppose they would be, sure. [364]

* * *

Redirect Examination

By Mr. Thomas:

Q. Would the same recommendation of Harry Ekzoozian on Eddie Ejadian be followed?

A. Yes. My mother listens to what Justice has to say. We get together and talk it over.

Q. I didn't say Justice. I said that suppose Harry Ekzoozian had recommended to you that somebody was not performing their job. Would your mother listen to him?

A. Oh, no. You mean listen to Harry Ekzoozian?

Q. Yes. A. My mother?

Q. Yes? A. No.

Q. Would she consider what he had to say in the same light that Mr. Justice had to say?

A. No. [365]

* * *

MARY MOSESIAN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Thomas:

Q. Who does the hiring and firing of your men in the warehouse?

A. Mother, Mrs. Mosesian. [369]

* * *

Q. (By Mr. Thomas): Did you ever discuss the Union with Machoian, either individually or as a group?

A. It was either the day before the day of the election or [375] the day of the election.

Q. Who was present?

A. He and Harry were working together that one day, and Eddie and Bob, they were in another place. I went along and I told the boys, "Today is election day in the afternoon. Yes was in favor of the union, No was in favor of the warehouse, non-union. They could vote as they pleased, as they saw fit."

* * *

Q. Did anyone ever complain to you about Moses Machoian's work in the warehouse?

A. Yes, sir.

Q. Was anyone else present when this—who complained to you?

(Testimony of Mary Mosesian.)

Mr. Bamford: Objection.

Mr. Thomas: Do you want me to ask when it occurred?

Mr. Bamford: Irrelevancy.

Trial Examiner Downing: Overruled.

Q. (By Mr. Thomas): Who complained to you about Moses Machoian's work?

A. Mr. Thomas, I will have to explain how I go about it, [376] first.

Trial Examiner Downing: Can't you say who complained?

The Witness: Eddie.

Trial Examiner Downing: He will get on to the rest of the situation, if you will answer the questions that are put to you. Now, who complained?

Mr. Bamford: Mr. Examiner, may I have a continuing objection to this line of questioning?

Trial Examiner Downing: Let's get this question over, first. Who complained?

The Witness: Nobody complained. I asked about it.

Trial Examiner Downing: Proceed, Mr. Thomas.

Q. (By Mr. Thomas): Who did you ask?

A. Eddie Ejadian was the first one I asked.

Q. What did you ask him?

A. How the new man is coming on the job.

Q. When did you ask this?

A. Oh, he was there about a month or so later.

Mr. Bamford: Mr. Examiner, may I now have my continuing objection?

(Testimony of Mary Mosesian.)

Trial Examiner Downing: Yes, let the record show a continuing objection by the General Counsel.

Mr. Thomas: Shall I proceed, Your Honor?

Trial Examiner Downing: Yes.

Q. (By Mr. Thomas): What did Eddie say to you in response [377] to your question?

A. He says, "He is all right but he doesn't do his share of the work."

Trial Examiner Downing: This is Eddie Ejdian now, you are speaking of?

Mr. Thomas: Yes.

Q. Did he tell you in what way he didn't do his share of the work.

A. He said when he was pulling the truck, he had to use all his energy and Mr. Machoian would just put his hand on the truck for one thing, and another time he said, "When we go to pick up the sacks, he makes me do all the lifting and he kind of does a little boosting and that is about all."

Q. Did you ask anybody else about Moses Machoian?

A. A few days later, I asked Harry Ekzoozian.

Q. You say that this occurred about a month after Machoian's employment with you?

A. Yes, sir.

Q. That would be about the middle of December?

A. Middle of December or last of December, right around in there sometime.

Q. What did Mr. Ekzoozian say?

A. Mr. Ekzoozian says, "The man is doing all

(Testimony of Mary Mosesian.)

he can. He has got a weak back. He has no strength in his one arm on account of his finger." He says, "I am doing most of the [378] work. Of course, I got the job for the man. I can't say too much about him."

Q. Did you tell your mother what Mr. Eddie Ejadian said? A. I did.

Q. Did you tell your mother what Harry Ekzoozian said? A. I did.

Q. What did your mother say?

A. "I will see about it."

Trial Examiner Downing: This was in December?

The Witness: Yes, the latter part of December or middle of December, somewhere around there.

Q. (By Mr. Thomas): Were you in the warehouse on April 12, 1949?

A. I am pretty sure I was there.

Q. That is the day he was fired, Mr. Machoian was fired. A. Yes, I was there that day.

Q. You were there the day Mr. Machoian was fired? A. Yes, I was there.

Q. Where were you working?

A. Mostly in the front office in our side of the building.

Q. Did anything happen? Do you recall the events that occurred on that day?

A. Mother came into the warehouse—

Q. Wait a minute. Just answer the question.

Trial Examiner Downing: The question is, do

(Testimony of Mary Mosesian.)

you recall [379] and the answer to that will be yes or no.

The Witness: Yes.

Trial Examiner Downing: Don't get ahead of him.

Q. (By Mr. Thomas): Will you please tell the Court in your own words what happened that day in connection with Mr. Machoian and your mother.

A. Mother went out to the warehouse and a little bit——

Q. When? A. In the morning.

Trial Examiner Downing: Now, don't testify to something you don't know of your own knowledge. Testify to what you saw.

The Witness: Well, she came back and told me about it.

Trial Examiner Downing: Don't testify to what she told you. You are asked to testify what you know of your own knowledge. Your mother will testify and she can speak of her own knowledge.

The Witness: It is hearsay on my part, then.

Q. (By Mr. Thomas): Did your mother come into the office in the morning? A. Yes, sir.

Q. Did she come in through the warehouse door?

A. No, she came through the side door, the back door of the west side.

Q. What did she say? [380]

A. She said, "I saw Moses Machoian smoking."

Q. Was she angry or happy? A. Angry.

Mr. Bamford: Mr. Examiner, I move the preceding two questions be stricken as hearsay.

(Testimony of Mary Mosesian.)

Mr. Thomas: If your Honor please, it is not hearsay. It is direct testimony as to what happened on the day that Moses Machoian was fired. It is all part of the *res gestae*. It is all part of the events.

Trial Examiner Downing: How closely connected is it to the time of the firing?

Mr. Thomas: Well, the firing took place at five o'clock that afternoon.

Trial Examiner Downing: And this was what time?

Mr. Thomas: It was the first time, in the morning.

Trial Examiner Downing: I will overrule the objection.

Mr. Thomas: Will you read the last question? Did the witness answer the last question, Mr. Reporter?

(Last question and answer read.)

Q. (By Mr. Thomas): Did anything else happen that day, that you saw or heard?

A. In the afternoon.

Q. What happened?

A. She came back in the afternoon.

Q. Who is "she"? [381]

A. Mother came back in the building, in the office, rather, and she says, "Well, that draws the straw. Mose is smoking again this afternoon."

Mr. Bamford: Again I object and move that that answer be stricken as hearsay, if it is offered to

(Testimony of Mary Mosesian.)

prove Machoian was smoking in the warehouse on that day.

Trial Examiner Downing: Objection overruled.

Q. (By Mr. Thomas): About what time did that occur? A. Right around four o'clock.

Q. Did anything else happen that afternoon?

A. She came in there and sat in the office and the more she thought about it, the madder she got. I could see the expression on her face.

Mr. Thomas: That is a conclusion. Pardon me.

Mr. Bamford: I don't mind.

Trial Examiner Downing: You don't object?

Mr. Bamford: No, sir.

Trial Examiner Downing: It will remain in the record then.

Q. (By Mr. Thomas): Anything else happen that afternoon?

A. She was going to fire him.

Q. Tell us what happened.

A. She sent one of the girls after him to tell him to come to the office.

Trial Examiner Downing: Which one did she send? [382] A. Violet Misikian.

Trial Examiner Downing: What is her job?

The Witness: She works in the office right along with us.

Trial Examiner Downing: She is one of the office girls?

The Witness: One of the office girls.

Q. (By Mr. Thomas): Did anything else hap-

(Testimony of Mary Mosesian.)

pen that day? What happened at five o'clock?
Did Mr. Machoian come into the office?

A. He did not.

Q. Tell the Court what happened.

A. Well, all the boys were going out, and mother saw Mose Machoian going out and she followed him out.

Q. And you saw her talking to him on the platform?

Mr. Bamford: Objection.

Mr. Thomas: I am sorry.

Q. Did your mother talk to Mr. Machoian that afternoon?

A. She must have talked to him, going out after him.

Mr. Bamford: Objection.

The Witness: Well——

Trial Examiner Downing: Just a moment. Testify only to what you saw.

Q. (By Mr. Thomas): Did you see your mother talking to Moses Machoian? A. Yes. [383]

Trial Examiner Downing: Did you hear the conversation?

The Witness: No, sir.

Q. (By Mr. Thomas): But you saw your mother talk to Moses Machoian?

A. We saw her stop Mose.

Q. Don't say "we."

A. I saw her stop Mose and talk to him.

Q. Saw her? A. Saw her. [384]

(Testimony of Mary Mosesian.)

Q. (By Mr. Thomas): Will you please tell the Court what your mother said, Mary, after she came back into the office from off the platform?

A. She said, "I fired Mose Machoian."

Q. Did she say why she had fired him?

A. Yes.

Q. Tell the Court what she said.

A. "I fired Mose Machoian, because he was smoking in the warehouse. He smoked twice today and I am just fed up with him."

Q. Did she say anything else?

A. I don't know. We talked about different things.

Q. I mean about Machoian.

A. No, not very much after that. [389]

Cross-Examination

By Trial Examiner Downing:

Q. Have you ever seen anyone smoke in the warehouse?

The Witness: We fired one man on that account before Machoian.

Trial Examiner Downing: Other than that, have you ever seen anyone smoke in the warehouse?

The Witness: Inside? No.

Q. (By Mr. Bamford): When did this discharge take place that you just mentioned, Miss Mosesian?

A. Well, the payroll would show that.

Q. What year? Do you remember what year it

(Testimony of Mary Mosesian.)

was? Was it before the war? A. No, no.

Q. During the war?

A. It was a little before Machoian came to work.

Q. How much before?

A. I can't remember that.

Q. What was the man's name?

A. Bob Mirikian.

Q. That wasn't the man that was found drinking? [398] A. No.

Q. What was his name?

A. Mirikian.

Q. Could you spell it for me, please?

A. M-i-r-i-k-i-a-n. [399]

* * *

Q. Now, I believe you said that both Ejadian and Ekzoozian spoke to you about a month after Machoian came to work and told you, in effect, that Machoian wasn't doing quite his share of the work, is that correct?

A. They didn't voluntarily tell me. I inquired. I asked about all new employees that come to the warehouse. He is not the only one.

Q. And they said that he wasn't pulling his own share, is that correct? A. Yes, sir.

Q. Is that the only occasion that you received such a report?

A. Well, the reason why I did that was because every now and then I like to take a report to my mother. [402]

* * *

(Testimony of Mary Mosesian.)

Q. (By Mr. Bamford): In other words, that day you didn't see your mother go into the warehouse? You just saw her come in, after she had been in the warehouse, is that correct?

A. Yes.

Q. And she said that she had seen Machoian smoking, is that correct? A. Yes, sir.

Q. And she appeared angry, is that correct?

A. Yes, sir.

Q. Do you remember what her exact words were, Miss Mosesian? [409] A. I can't.

Q. Can you give the substance?

A. That Mose Machoian was smoking. I remember that part of it.

Q. Then I think you have testified also that during the afternoon she said that she caught Mr. Machoian smoking again, is that correct?

A. Yes.

Q. Was that one of these little tours around her garden? Was she following one of these little tours around her garden, that she came back and said that, or did she go out into the warehouse specifically? A. I don't remember.

Q. All you remember is that your mother caught him again? A. Yes.

Q. And that she again appeared angry, is that correct? A. Yes.

Q. And then you said, I think also, that she sent Violet Misikian, is that correct? A. Yes, sir.

Q. Into the warehouse?

A. Violet Misikian—your Honor, I will have to

(Testimony of Mary Mosesian.)

do a little more explaining again.

Trial Examiner Downing: You have been asked if you testified that she sent Violet Misikian into the warehouse. [410]

The Witness: Yes.

Trial Examiner Downing: Did you testify to that?

The Witness: Yes. She went out into the building.

Trial Examiner Downing: You were just asked if your mother sent her into the warehouse. You have answered that.

The Witness: I will have to explain how that came about.

Trial Examiner Downing: You are not being asked to explain how that came about. You are just being asked if it happened.

The Witness: I didn't hear mother telling her to go out into the warehouse.

Q. (By Mr. Bamford): In other words, you don't know if your mother sent Violet out?

A. No.

Q. Yes, and you didn't see Violet go into the warehouse, did you? A. I did.

Q. You saw her? A. Yes.

Q. But you don't know whether your mother sent her out?

A. No. She went right by my office.

Q. And did she return? A. She did. [411]

VIOLET MISIKIAN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Thomas:

Q. Did Mrs. Mosesian come into your office that day? A. Yes. She came in several times.

Q. Did you hear her complain about any employees on that day?

A. Well, it was about four o'clock——

Q. Answer the question. A. Yes.

Q. Who? A. Mose Machoian.

Q. Do you personally know Mose Machoian?

A. I know who he is.

Q. Tell us in your own words what happened on that day in connection with Mrs. Mosesian and Mose Machoian?

A. Well, I was making my payrolls and pay checks and, all of a sudden, Mrs. Mosesian came in from the back to my office, very angry and agitated, and she started talking, and I asked her what was wrong, and she says, "Well, I saw Mose Machoian smoking." She says, "I have told the employees many and many a time not to smoke in the warehouse proper." And then she went in and told the girls, Mary and Louise.

Q. Did she speak in Armenian?

A. Yes.

Q. Do you understand Armenian? [415]

(Testimony of Violet Misikian.)

A. I do.

Q. Did anything else happen that day?

A. Well, again in the afternoon she came in to sign some more checks, into the warehouse, and she went out into the warehouse again and came in again very mad and talking and she told the girls, "Well, I saw Mose Machoian smoking again," and, she says, "I will have to discharge him."

Q. Did you see her go into the warehouse?

A. Yes, I did.

Q. Did she go in through your door?

A. Yes. She usually does. She asked me if she has any checks to sign, and then she went through the back.

Q. Do you recall about what time that was, when she went into the warehouse?

A. I should say about 3:30 or 4:00 o'clock.

Q. Did anything else happen?

A. Well, the only recollection I have is that she came back and told me to go back into the warehouse and see Mose Machoian and tell him to come back into the office before going home.

Q. Did you go to see Mose Machoian?

A. Yes. I went through the offices and into the warehouse, proper to see where the men were working, and I went to the box car and Harry Ekzoozian and Mose Machoian were working together, loading a box car. [416]

Q. What did you tell Mose Machoian?

A. I told him to come into the office, when he got his pay check, that Mrs. Mosesian wanted to see him.

(Testimony of Violet Misikian.)

Q. Did he say anything?

A. Not that I remember.

Q. Did you see Mose Machoian come into the office?

A. No, I did not. The only recollection I have——

Q. Answer the question.

A. No.

* * *

Q. Did anything else happen that day between Mrs. Mosesian and Machoian? [417]

A. Well, towards evening, closing time, I was getting my work up to date and she was sitting, waiting for Mr. Machoian to come in, and all I remember is that she went out of the building after him. She went out of the door to the platform, and I don't know what she did. She went after Mr. Machoian.

Q. How do you know she went after Mr. Machoian?

A. She said, "He didn't come in. There he goes. I am going after him." So she left.

Q. Did you hear what she said to Mr. Machoian?

A. No, I did not.

Q. Did she return to the office after—pardon me. Did you see her talking to Mose Machoian?

A. No, I did not. [418]

* * *

Q. Who employed you, Miss Misikian?

A. Mrs. Mosesian.

Q. When you came to work in the warehouse, did she mention smoking at all to you?

(Testimony of Violet Misikian.)

A. Yes, she did.

Q. What did she tell you? [421]

A. She said smoking was prohibited in the warehouse, that if we ever did smoke to go in the rest rooms and smoke.

Q. That is, you office girls? A. Yes.

Cross-Examination

* * *

By Mr. Siciliano:

Q. Now, you say that you heard Mrs. Mosesian, the old lady, complain about Mose the first time. What time was that?

A. Well, I would say before noon.

Q. Before noon. And what were you doing?

A. I was making payroll checks. [423]

* * *

Q. (Continuing): —on April 12th, when Mrs. Mosesian came into [424] see you, what did she come in for that time?

A. That time she had been in the back of the warehouse again, and then she came in and she said she caught Mose Machoian smoking and for me to go and tell him to come into the office proper, that she wanted to see him before he went home.

* * *

Q. And the second time, she asked you to give the message to Mose?

A. Yes. She came in very agitated and told me to tell him to come in before he went home. [425]

* * *

HARRY EKZOOZIAN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Thomas:

Q. When you came back from working for the Government, who did you talk to about a job at the warehouse? A. To Mrs. Mosesian.

Q. She is your boss at the warehouse?

A. Yes, sir.

Q. If you want anything, you talk to her?

A. Yes, sir.

Q. She hired you? A. She hired me.

Q. Did she tell you anything about smoking, when she hired you? A. Yes, sir.

Q. What did she say?

A. She said, "Be careful. Don't smoke in warehouse."

Q. Has she always told this to you?

A. Yes, sir.

Q. When you worked there before? [441]

A. Yes, sir.

Q. Are there any "No Smoking" signs in the warehouse, Harry?

A. Yes, sir, a few places over there.

Mr. Bamford: May I have that answer?

Trial Examiner Downing: A few places over there.

Mr. Bamford: Thank you.

(Testimony of Harry Ekzoozian.)

Q. (By Mr. Thomas): Do you know where they are? A. In No. 1 section and——

Q. That is the north section?

A. The north section and then on the second section.

Q. Where are the signs in the No. 1 section?

A. Right on the posts over there. It says, "Be careful. No smoking."

Q. Do you smoke, Harry?

A. Yes.

Q. Where do you do your smoking?

A. On the platform, smoke outside.

Q. Have you ever smoked inside?

A. No. [442]

* * *

Trial Examiner Downing: You were asked about whether the other men smoked, and you said they did. Then you were asked if they smoke inside the warehouse. Do they? Do other men down there working with you smoke in the warehouse?

The Witness: Yes, sir.

Trial Examiner Downing: How many of them do?

The Witness: I just see one smoking. That is my partner. Just once.

Trial Examiner Downing: Just one.

Q. (By Mr. Thomas): When you were working in the warehouse, who did you work with, Harry?

A. Mr. Machoian.

Q. He was your partner?

A. Yes, sir.

(Testimony of Harry Ekzoozian.)

Q. Have you ever seen Mr. Justice smoke in the warehouse?

A. Well, I always see a pipe in his mouth, but I don't know if he smokes or not. [443]

Trial Examiner Downing: You don't know whether it was lit?

The Witness: I don't know exactly.

Trial Examiner Downing: He just carries it around in his mouth?

The Witness: Yes.

Trial Examiner Downing: Does he ever have a cigar in his mouth?

The Witness: I don't see him.

Trial Examiner Downing: Does he ever have a cigarette in his mouth?

The Witness: No, no cigarette, always just a pipe in his mouth.

Q. (By Mr. Thomas): How long have you known Moses Machoian?

A. About twenty years.

Q. Did he ask you to help him get a job at the warehouse? A. Yes, sir.

Q. Did you help him get a job?

A. Yes, sir.

Q. How did you help him to get a job? What did you do? Did you take him to see Mrs. Mosesian?

A. I took him to Mrs. Mosesian's house, his wife and my wife.

Q. Was anybody else over there?

A. Louise was over there and Mrs. Mosesian was over there.

(Testimony of Harry Ekzoozian.)

Q. Now, would you tell the Court in your own words what Mrs. [444] Mosesian said to Mr. Machoian when she hired him?

A. Well, I asked her for him for a job, and she said, "O.K. Come down tomorrow." So Friday night we go over there and Mose says, "I can't come down tomorrow. I can come down Monday." Then he wanted to go to the cannery to give notice over there before coming down and start to work over there.

Q. Did Mrs. Mosesian say anything about smoking, when she hired him?

A. She says, "When you come down, Mose, be careful. No smoking in the building. I told everybody in the warehouse and I am going to tell you the same way, too." [445]

* * *

Q. Mose Machoian worked with you most of the time, Harry? A. Yes, sir.

Q. Did he work with anyone else there in the warehouse?

A. Sometimes a change of partner.

Q. Would you say that he spent practically all of his time with you? A. All with me.

Q. Did Mose Machoian smoke?

A. Yes, sir.

Q. Did you see him smoke? A. Yes, sir.

Q. Where did you see him smoke? [446]

A. I seen him smoke at the warehouse.

(Testimony of Harry Ekzoozian.)

Q. Did you see him smoke a cigarette or a pipe or what? A. Just cigarettes.

* * *

Q. (By Mr. Thomas): Did you ever mention to Mose Machoian—did you ever talk to Mose Machoian about his smoking? A. Yes, sir.

Q. What did you say to him?

A. I told him, I said, "Be careful. Don't smoke in the warehouse." Not only Mose, I told everybody. [447]

* * *

The Witness: Me and Mose worked together, and I went to the toilet, and when I go to the toilet, then I came back after five or ten minutes and I see the old lady standing up on the other side. When she saw me, she said, "Harry, come over here. Did you see Machoian smoking over here?" She said, "Do you see Machoian smoking?" and I didn't say nothing, because she see him herself.

Trial Examiner Downing: Did you see him?

The Witness: Yes.

Trial Examiner Downing: Was he smoking?

The Witness: Yes.

Trial Examiner Downing: Where was he?

The Witness: In the Section number two.

Trial Examiner Downing: That is the middle section?

The Witness: Yes, where they stack up the rice. I went over to the toilet, and he await for me. [449]

* * *

(Testimony of Harry Ekzoozian.)

Q. Did Mrs. Mosesian say anything to Mose Machoian at that time?

A. Yes, sir. She said, "I told you how many times don't smoke in the warehouse. I'm afraid you will make a fire some day around here."

Trial Examiner Downing: What did Mose do?

The Witness: Well, Mose he just threw the cigarette on the floor and stamped it. [450]

* * *

Trial Examiner Downing: Now tell us which is right.

The Witness: Well, he smoked once in the morning and once in the afternoon.

Trial Examiner Downing: The same day?

The Witness: Same day, yes. I remember now, and the old lady came down and she said, "I told you a lot of times don't smoke here." [451]

* * *

Q. Will you tell the Court what happened when Mrs. Mosesian came up and what she said about the smoking in the afternoon.

A. The afternoon? She said, "I told you a lot of times no smoking, Mose. Mose, I get sick and tired. I am afraid you are going to make a fire in this building." [454]

* * *

Trial Examiner Downing: He is asking you about that same afternoon now, after Mrs. Mosesian was there and talked to you and Mose. Did anyone

(Testimony of Harry Ekzoozian.)

else come from the office that afternoon to talk to Mose?

The Witness: In the afternoon? Violet came down. She said the old lady went to see——

Q. (By Mr. Thomas): Wait a minute. Did you hear what Violet said to Mose?

A. What?

Trial Examiner Downing: Did you hear it?

The Witness: No.

Trial Examiner Downing: How do you know what she said?

The Witness: She said, "The old lady wants to see Mose."

Trial Examiner Downing: Did you hear her say that or not?

The Witness: I heard it, because I was there on the—— [455]

Trial Examiner Downing: Well, you did hear it then?

The Witness: I was there. I hear it all right. That is all I know.

Q. (By Mr. Thomas): What did she say, Harry?

A. She come down and she tell Mose, "Mrs. Mosesian wants to see you tonight before you go home."

Q. Did Mose say anything to you about it?

A. No. [456]

* * *

Q. Where were you going?

(Testimony of Harry Ekzoozian.)

A. His daughter was over there, waiting for us.
Trial Examiner Downing: Who?

The Witness: His daughter. She always wait for him nights. She take him home morning and nights.

Q. (By Mr. Thomas): Mose's daughter was waiting for you? A. Yes.

* * *

Q. Did you hear Mrs. Mosesian call "Mose"?

A. She hollered. I looked back and I see them speak together.

Q. Did you stop?

A. No, I kept on going. I went right beside the car. [457]

Q. Then you got in the rear seat of the car?

A. Yes, and then Mose and Mrs. Mosesian talked together.

Q. For how long?

A. Four or five minutes.

Q. Then did Mose come down into the car?

A. Yes, came down into the car.

Q. Did he say anything?

A. Well, I just said, "Mose, what did she say?" and the first time, he said nothing. Then after, later on, he said, "You know, Harry, what she say? She said, 'Don't come down to work tomorrow.'"

Q. Did he tell you why she said that?

A. For smoking.

Q. Did he say that? Did Mose Machoian say that?

(Testimony of Harry Ekzoozian.)

A. No, Mose Machoian said nothing to me.

Trial Examiner Downing: You asked why did she say that?

The Witness: He said she said, "Don't come down to work tomorrow."

Trial Examiner Downing: What else did he say about it? Anything?

The Witness: No.

Q. (By Mr. Thomas): He told you that while he was driving you or his daughter was driving you home?

A. Yes, sir. [458]

* * *

Q. (By Mr. Thomas): Did Louise ever talk to Mose about his singing or dancing?

A. Yes. [459]

* * *

Q. Did Louise talk to Mose? Do you remember what Louise said to Mose?

A. Well, Louise said, "This is not a dancing room. You come down here for work, not for dancing."

Trial Examiner Downing: Did you hear what she said?

The Witness: Yes, that is all she said. [460]

* * *

Q. (By Mr. Thomas): Did Mary ever talk to you about the Union?

A. No, sir, no.

Q. Did Louise ever talk to you about the Union?

A. No.

(Testimony of Harry Ekzoozian.)

Q. Did Mrs. Mosesian ever talk to you about the Union? A. No.

Q. When did you first know about the Union?

A. When I see the election, when I see the sign over there. [464]

Q. For the election?

A. When they hang up the sign over there, then I notice.

Q. That is the first time you heard about it?

A. That is the first time I heard about it.

Q. Did Mary ever talk to you and Mose about the election?

A. That is the election time, and Mary says, "Well, Mose and Harry," she says, "now it will be the election and that is up to you." She says, "Yes, that is the Union; no, the warehouse. That is up to you fellows."

Q. Did you ever talk to Mary about Mose's finger? A. Mose's finger?

Q. Yes. A. Yes, sir.

Q. What did you tell her?

A. I said that he got a smashed finger and he can't throw the sack high, like when he take one side and I take the other side, he can't lift it, and everything is heavier on my side.

Trial Examiner Downing: Would you mind fixing the time and the place.

Q. (By Mr. Thomas): Do you remember when you talked to Mary? Where was Mary, when she talked to you?

(Testimony of Harry Ekzoozian.)

A. In the warehouse, but I don't remember what place.

Q. Do you remember when it was?

A. No, I don't remember that either.

Trial Examiner Downing: How long after Mose came to work [465] there?

The Witness: About two weeks.

Trial Examiner Downing: Two weeks after he came to work there?

The Witness: Yes. [466]

* * *

Q. Did Louise Mosesian ever talk to you and Bob and Mose and Eddie in a box car?

A. Box car?

Q. Yes. A. Yes, sir.

Q. Do you remember when she talked to you?

A. Yes, sir.

Q. When? About when was it?

A. I don't remember the date but she came down to the box car and told the boys, "Step on it," she says.

Q. Did she tell Mose or all of you?

A. All of us.

Trial Examiner Downing: Where?

The Witness: In the box car.

Trial Examiner Downing: What did she tell you?

The Witness: She told the boys, "Step on it."

Trial Examiner Downing: Step in it? [467]

The Witness: Work fast. She said, "A couple

(Testimony of Harry Ekzoozian.)

of hours you should unload a car, four or five guys can't finish the car in one day."

Q. (By Mr. Thomas): Why did Louise come to say that? A. She always comes down.

Q. She came down?

A. She always comes down.

Q. Why do you remember this particular box car?

A. Well, because the whole bunch was over there.

Q. All of you were there together?

A. All of us were together.

Q. Was anything going on at that time?

A. No. We just talked together. The boys were standing over there, smoking and chewing the rag, and then she saw them and then she came down right there.

Q. Were you talking, arguing, at that time?

A. No argument, just general talk.

Trial Examiner Downing: Were you inside the box car?

The Witness: Inside the box car, your Honor.

Q. (By Mr. Thomas): Did Louise at this time ever mention the Union? A. No.

Q. Did she mention Mr. Sohigian?

A. No.

Q. Did she ever mention Mr. Sohigian to the group? [468] A. No.

Q. Wait until I finish. Did she ever mention Mr. Sohigian to the group of you? A. No.

(Testimony of Harry Ekzoozian.)

Q. She never talked to you about Mr. Sohigian?

A. No.

Q. Did you have an argument with Mose about Mr. Sohigian? A. Yes, sir.

Q. When was that?

A. That is the same day, the same day, with Mose.

Q. Was this before——

Trial Examiner Downing: Which day? Let's find out which day it is.

Mr. Thomas: I didn't hear, your Honor.

Trial Examiner Downing: He said the same day, but I am not sure of what he is talking about. The same day as what?

The Witness: About three or four days. I do not remember what day. It was in the car. Me and Mose worked together, and Bob was there. I told him—I don't remember. It was just general talk. I said, "Mr. Sohigian is at Mrs. Mosesian's house."

Trial Examiner Downing: I don't understand that.

Mr. Thomas: He said that Mr. Sohigian was at Mrs. Mosesian's house.

The Witness: Machoian said, "No." [469]

I said, "Yesterday I saw him."

He said, "You are a liar." He said, "I will bet you anything he is not here. He is out of town, Mr. Sohigian," Moses says.

I said, "No, Moses, he is around here."

Then he called me a liar and he said, "You don't tell the truth. You are a spy."

(Testimony of Harry Ekzoozian.)

Then I told Mose, "Take your words back."

Just common talk, your Honor, no fight, just arguments.

Then he says, when I make him believe then that Sohigian was at the Mosesian's house last night, and he believed and calmed down, he said, "Why don't you tell me before, Harry?"

I said, "I told you but you do not believe me."

Then we were good friends and then we worked together three months after that argument, and he always take me home in the morning and at night.

Trial Examiner Downing: You worked together three months after that argument?

The Witness: Yes, your Honor.

Trial Examiner Downing: And that is the only time that you and Mose talked about Sohigian?

The Witness: Yes, and he gave me rides morning and night, and we were good friends. I go to his house and he come to my house.

Q. (By Mr. Thomas): Did Louise come into the box car while [470] you were working?

A. Yes, she came down and she said, "What are you hollering for, you fellows? What are you arguing about?" And we answered, "Nothing," and she left. [471]

* * *

(Testimony of Harry Ekzoozian.)

Cross-Examination

By Mr. Siciliano:

Q. Now, at the warehouse you say there are signs? A. Yes, sir.

Q. Where are these signs?

A. There is a sign in the first section, right on the post, and the second section, and in the middle room.

Q. Are these signs in the second section on the post? A. Yes.

Q. Are there any other signs that you have ever seen there?

A. Well, I seen them upstairs, too, but somebody throw down.

Q. Somebody threw down the signs upstairs? Are they on the post?

A. Hanging up on paper.

Q. Now, at the time that you were working there with Mr. Machoian, were these signs that were hanging up, there, too? A. Yes, sir. [475]

Q. Did you ever see them? A. Yes, sir.

Q. Did you ever know who pulled them down?

A. No, I don't know that.

* * *

Q. Now, with regard to smoking of Mr. Justice, you say he had a pipe in his mouth?

A. That is right.

Q. Did you ever see him have any matches?

A. I never saw him. I see a pipe always in his mouth.

(Testimony of Harry Ekzoozian.)

Q. Outside of the warehouse? [476]

A. Inside the warehouse.

Q. No. When he is outside of the warehouse, did you see him smoking out there, outside of the warehouse?

A. Yes, I see him smoking outside the warehouse.

Q. He smokes a pipe outside the warehouse?

A. Outside.

Q. On the platform? A. On the platform.

Q. Does he smoke cigars outside the warehouse?

A. Yes.

Q. Does he have the cigar in his mouth when he comes in to the warehouse?

A. Sometimes.

Q. Have you ever seen him smoking?

A. No.

Q. He just has it in his mouth?

A. Always in his mouth. [477]

* * *

Q. Once in a while do all of you work in a car?

A. We work in a boxcar, yes.

Q. So you work once in a while together?

A. So we have a chance to smoke over there.

Q. You smoke in the car? A. Yes. [480]

Q. Is that all right, when you smoke in the car?

A. Well, no danger.

Q. They don't care when you smoke in the car?

A. They don't say nothing over there.

Q. But you all smoke in the car?

(Testimony of Harry Ekzoozian.)

A. Most always smoke on the platform.

Q. But inside the boxcar it is okay to smoke, inside the boxcar? A. It is all right.

Q. Everybody smokes inside the boxcar?

A. Everybody smokes over there. There is no danger or anything.

Q. When you are carrying things in and out, it is all right? A. That is right.

Q. When you are carrying things outside the car, where do you go with the things? Sometimes do you bring them inside the building?

A. The stuff?

Q. Yes. A. Yes.

Q. You come right from the car to the inside of the building? A. That is right. [481]

* * *

Q. Now, do you remember when you were all in the boxcar, working one day, and Louise came in and asked you about the Union?

A. No. She came in but she never mentioned no union over there.

Q. Did she ever say to you about who had signed up? A. No, not there.

Q. Were you there?

A. Maybe I was not there, I say. If I was there, she don't say like that. She just says, "Come on, Bob. Step on it."

Q. Did you come in after she said that?

A. I don't remember that.

Q. Did you come in to the car, after she said that?

(Testimony of Harry Ekzoozian.)

A. I don't know that. When I was there, she came in and said, "Come on, boys, step on it." After that I don't know.

Q. What did she mean, when she said, "Step on it"?

A. She meant, "Hurry up, work fast, keep on going." [497]

* * *

Q. What did Mose say to you, when you were arguing in the boxcar?

A. Well, we were arguing about Sohigian. We argued about Sohigian. We just talked generally, just like friends, and I told him, I said, "Mose, I saw Sohigian last night," and he said, "Where"?

I said, "At the Mosesians' house," and he said, "No, Harry."

And I said, "Yes, I saw him, Mose," and he said, "You are a liar."

And I said, "No, Mose." He said, "I will bet he is not here. He is out of town."

And I said, "No, he is here in town." Then I say, "I saw him right there."

When we got called down, then we forgot altogether everything.

Q. You say that it was a friendly argument?

A. Yes. He says, "I am sorry, Harry, I said that. Why didn't you tell me that before?"

Then after that we were still friends, talking together nice ways just like friendship, you know. He take me home, [500] bring me back in the morning, take me home at night.

(Testimony of Harry Ekzoozian.)

Q. Yes, I see. And Louise came into the boxcar when you were arguing?

A. Yes, she came down hollering. She said, "Why are you hollering, boys? Come on, step on it."

Q. You were hollering?

A. She hollered to us.

Q. I know, but were you hollering too?

A. Me and Mose were just arguing about Sohigian.

Q. But you were hollering, too?

A. Yes, we argued together. [501]

* * *

Q. (By Mr. Siciliano): This morning you said that Harry called you a spy—pardon me—that Mose called you a spy, is that right? A. Yes.

Q. When did he call you a spy?

A. That argument there.

Q. Which argument?

A. That day they were arguing about Sohigian. He said, "How do you know?" He said he worked for Sohigian before and he thinks I told the old lady about how he worked at Mr. Sohigian's, that I told her, and I said, "Mr. Sohigian was right there last night. The whole family was right there."

Q. Had you talked about Mose's working at Sohigian's before that night?

A. About Sohigian being over there at Mrs. Mosesian's house.

Trial Examiner Downing: I don't understand this. Let's [503] start over again.

Mr. Thomas: Wait a minute, Your Honor. I

(Testimony of Harry Ekzoozian.)

don't even know what the question is or what the answer is made to it. Let him ask the question the way the witness can understand.

Trial Examiner Downing: Let's hear the question, please. I think the question was understandable.

Q. (By Mr. Siciliano): Had you talked to Mose about Mr. Sohigian before that night?

A. When I was that night at Mrs. Mosesian's house, he talked about Mose. He says, "Is Mose working over there"? And I said, "Yes, sir."

He says, "He got laid off over there. He don't have any job over there."

Q. Who said this? A. Mr. Sohigian. [504]

* * *

Q. (By Mr. Siciliano): Now, Harry, did you talk to Mose about Mr. Sohigian before this time that you had the quarrel? A. No.

Q. And why did Mr. Sohigian's name come up then, this time?

A. Because Mr. Sohigian said that Mose worked in his plant and broke the die, broke the pipe over there, the die. That is all.

Q. Who did he say this to?

A. Mr. Sohigian told me.

Q. He told you this? A. Yes.

Q. And did you tell Mrs. Mosesian about it?

A. No. I just told Mose that next day.

Q. And Mose accused you of telling Mrs. Mosesian about this?

(Testimony of Harry Ekzoozian.)

A. No. Just we were arguing together and then I told Mose, I said, "I saw Mr. Schogian at Mrs. Mosesian's house last night."

And he said, "What did he say, Harry?" Moses told me like that, and he said, "Did he say anything about the Union?"

I said "No." He said, "What did he say?"

I said, "He just said Mose working over there and just [506] breaking the die and also breaking the pipes, always making damage for the pipe." That is all I said to Mose, nothing else.

Q. You had been to the house of Mrs. Mosesian the night before? A. Yes.

Q. And Mr. Sohigian was there, too?

A. Yes, sir.

Q. And that is when this conversation about Mose came up, the night before at the house of Mrs. Mosesian? A. Yes.

Q. You first talked about Mose that night before? A. Yes.

Q. And Mr. Sohigian talked, too, that time at the house?

A. Yes, about breaking the die and breaking the pipes. That is all he told me.

Q. Were you visiting socially, just a friendly visit? A. No, just once a month.

Q. You had your wife with you? A. Yes.

Q. You would go there about once a month?

A. Yes, sir.

Q. And this particular time that you went there, you found Mr. Sohigian was there, didn't you?

(Testimony of Harry Ekzoozian.)

A. His whole family was there, too. [507]

* * *

Q. What else did you talk about?

A. That is all. We were talking about the church or the weather or business or——

Trial Examiner Downing: Don't go into all of that, please, counsel. It was a social visit. You can ask him about anything relative to the issues, if you wish.

Q. (By Mr. Siciliano): This night when you were at the Mosesian's, was anything else said about Moses? A. No. [508]

* * *

Q. When you left, did Mr. Sohigian stay there or did he go with you? A. He go.

Q. He went when you did?

A. Yes, sir. [509]

* * *

EDWARD EJADIAN

recalled as a witness by and on behalf of the Respondent, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Thomas:

Q. Eddie, when did you first come to work at the State Center Warehouse? Do you remember? [535] How long have you worked there?

A. It is over two years.

(Testimony of Edward Ejadian.)

Q. Who hired you, Eddie? A. Mama.

Q. That is Mrs. Mosesian?

A. Mrs. Mosesian.

Q. When you were hired, did she tell you anything about smoking?

A. She didn't say nothing about that.

Mr. Bamford: I didn't hear the answer, please

The Witness: She didn't say nothing then.

Q. (By Mr. Thomas): Did she tell you when you first came to work, whether or not you could smoke in the warehouse?

A. Later on she told me. She said, "If you guys want to smoke, you will smoke outside." She told me that.

Q. Then you knew that you were not to smoke inside the warehouse? A. That is right.

Q. What would happen if you smoked inside the warehouse? A. There would be damage, fire.

Q. Would anything happen to you?

A. Well——

Q. Would you be fired or would you be kept on and employed? A. I would be fired.

Mr. Bamford: Objection, Mr. Examiner. [536]

* * *

Q. Eddie, when did Mrs. Mosesian first talk to you about smoking?

A. I don't remember that.

Q. Was it right after you started working at the warehouse? A. I suppose so.

Q. Do you know, Eddie?

A. I think after I started working. [537]

(Testimony of Edward Ejadian.)

Q. Right after you started working there?

A. Yes.

Q. And she told you you were not to smoke?

A. She told everybody not to smoke in the warehouse, "If you want to smoke, go outside on the platform and smoke." [538]

* * *

Cross-Examination

By Mr. Bamford:

Q. Did you ever see Mama Mosesian smoke in in the warehouse? A. I didn't see her.

Q. Did you ever see Mr. Justice smoke in the warehouse? A. Yes. [540]

Q. What would he be smoking?

A. Either a pipe or a cigar.

Q. You could see the smoke come out?

A. Yes.

Mr. Thomas: I object to that, your Honor. There is no foundation laid for it.

Mr. Bamford: On cross-examination, Mr. Thomas?

Trial Examiner Downing: Counsel is on cross-examination. You went into the question of smoking on direct examination.

Mr. Thomas: All right, your Honor.

Q. (By Mr. Bamford): Did Mr. Justice ever speak to you about smoking? A. No. [541]

* * *

Q. (By Mr. Bamford): I will read again:

(Testimony of Edward Ejadian.)

“There were never any no smoking signs in the warehouse until yesterday, Monday, June 27, 1949.”

Now, do you remember Mrs. Phoenix reading that to you?

A. It has been so long, I forgot.

Trial Examiner Downing: Well, do you remember telling her that? Do you? Did you tell her what was written down there, that was just read to you?

The Witness: Yes.

Trial Examiner Downing: Is it true?

The Witness: That is true.

Trial Examiner Downing: Proceed, Mr. Bamford.

Q. (By Mr. Bamford): “For the first time there were about five or six paper signs in the warehouse, saying, ‘No Smoking.’”

Do you remember that?

A. Yes, sir.

Q. Do you remember Mrs. Phoenix asking you about smoking signs? A. Yes.

Q. Does this help you remember what you told Mrs. Phoenix? [545]

A. Yes.

Q. And that was true?

A. That is true. That is true.

Mr. Bamford: That is all.

Trial Examiner Downing: Any redirect examination?

Mr. Thomas: Yes, your Honor. [546]

(Testimony of Edward Ejadian.)

Redirect Examination

* * *

By Mr. Thomas:

Q. Eddie, when you were talking here about signs in the warehouse, were you talking about cardboard signs or were you talking about those signs that are up upon the cement posts?

A. Cardboard signs. [549]

* * *

Q. (By Mr. Thomas): How long have the signs on the cement posts been up there, Eddie? Were they there when you came to work?

A. No, after.

Q. Do you know what a stencilled sign is, Eddie?

A. Yes, I know. I know what a stencilled sign is.

Q. It is a sign painted on the post?

A. Yes, it is on the post.

Q. Now, were those put up there after you came to work? A. I can't remember.

Q. Eddie, are you afraid to testify, because you have given this affidavit? Is that what your reason is? Are you afraid of what is going to happen to you?

A. What am I going to be afraid about?

Q. I don't know.

A. I am not afraid about nothing. If I am afraid, I won't come over here to testify.

Q. All right, Eddie.

(Testimony of Edward Ejadian.)

Trial Examiner Downing: Witness, there is nothing to be afraid of.

The Witness: Yes. You are not supposed to be afraid of nothing, just afraid about God. That is the only one you are afraid of.

Trial Examiner Downing: You have sworn an oath here to [551] tell the truth, and that is the only obligation while you are here.

The Witness: If I don't know something, I don't know. [552]

* * *

Q. You have seen a "No smoking" sign on that door? A. Yes. They got them all over.

Q. They have these cardboard signs all over?

A. That is right.

Q. Was that cardboard sign on that door when you came to work? A. No.

Q. It wasn't there? A. No, sir.

Q. Do you remember when one was put there?

A. I don't remember, but later on they put, like I told her and she wrote it. That is the time they put it.

Q. There wasn't any on the door prior to that time? A. No. [554]

* * *

Q. Now, did you mean that you believed the statement was true, when it was written here and you signed it? A. Yes, sir.

Q. When he asked you the question, did you remember the exact statement that you had made, or did you just remember that you had signed this?

(Testimony of Edward Ejadian.)

A. I just remembered that I had signed it.

Q. That is all you remembered about it?

A. Yes.

Q. And when he read it, you did not then remember the things you said? A. No.

Mr. Snell: If the Court please, I would like to move to have the testimony stricken on the ground that it is actually a past recollection recorded attempt rather than the refreshing [557] of his memory.

Trial Examiner Downing: Denied. His testimony was quite clear on cross-examination.

* * *

ROBERT KRIKORIAN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: [558]

Direct Examination

* * *

By Mr. Thomas:

Q. When did you come to work for the State Center Warehouse?

A. December of '48, if I am not mistaken.

Q. How long did you work for the [559] warehouse?

A. Three months, about three months.

Q. Who employed you, when you came to work?

A. Mrs. Mosesian.

Q. Where did she employ you?

(Testimony of Robert Krikorian.)

A. I went to her home.

Q. Did she tell you anything about smoking, when you came to work? A. Yes, sir.

Q. What did she tell you about smoking?

A. Well, just told me we are not supposed to smoke at the warehouse.

Q. Did you ever smoke in front of Mrs. Mosesian? A. Not if I could help it.

Q. Did she ever catch you smoking?

A. One time.

Q. What did she do?

A. Reprimanded me. [560]

* * *

Q. Did you ever see Mose Machoian sing or dance in the warehouse? A. Yes, sir.

Q. Do you recall about when that was after your employment?

A. No, I couldn't say possibly.

Q. Was anyone else present at the time?

A. I don't know. I wouldn't say.

Q. Do you remember where he sang or danced in the warehouse? A. In the warehouse.

Q. Just in the warehouse. Was it during working hours? A. Yes.

Q. Did you ever see Mose Machoian smoke in the warehouse? A. Yes, sir.

* * *

Q. Did Louise Mosesian ever talk to the group of warehousemen in a box car where you were working? A. Yes, sir.

(Testimony of Robert Krikorian.)

Q. Do you remember when she talked to you? Let's say you came to work on December 7th. [561]

A. That is pretty close.

Q. About how long after that would you say?

A. Well, I would say about a month and a half. That is pretty close.

Q. According to your payroll records, you left on March 2nd? A. Yes.

Q. Does that help you? Was it a week before you left? A. No.

Q. A month? Two months?

A. Well, it wasn't after February and it wasn't before the 15th of January, so it is in between there. That is my estimation, as close as I can recall it.

Trial Examiner Downing: Was there only one occasion that she came to the box car, when you were there?

The Witness: Only one time that I remember.

Q. (By Mr. Thomas): Who else was present at the time? A. Do you want the names?

Q. Yes.

A. Mose, Eddie, Harry, myself. That is all I know of. That is about all I am pretty sure there was.

Q. Do you remember what was said at the time by Louise? A. Yes.

Q. What did she say?

A. She said—she walked into the box car and she wanted to know if any of the boys had spoken to anybody. [562]

Trial Examiner Downing: About what?

(Testimony of Robert Krikorian.)

The Witness: She didn't say what, sir, and everybody said, "No." And then she asked us individually, did any of us join the union, right around, and we said, "No."

Q. (By Mr. Thomas): How long was she present in the box car?

A. Couldn't have been over ten minutes.

Q. What happened? What did she do, after she had asked you if you had joined the Union?

A. What did she do?

Q. Yes.

A. She turned around and asked Harry, that Mama always kept four or five men working in the warehouse even in tough times, and Harry says, "Yes." And she said something about "Mama could always shut it or rent it out, the warehouse." And I don't know how that came about, because I haven't asked.

Q. Because you what? A. What was that?

Q. You say "because you haven't asked."

A. Because I have been through it already.

Q. What do you mean?

A. With Mr. Bamford.

Q. You mean he interviewed you as a witness?

A. That is right.

Q. Was anything else said at that time, that you remember?

A. No, not that I remember. [563]

Q. Was there any other box car meeting between the warehouse and Louise?

A. Not that I remember.

(Testimony of Robert Krikorian.)

Trial Examiner Downing: Did she say anything about a letter from the Labor Board that she had?

The Witness: No, sir.

Q. (By Mr. Thomas): Do you ever remember Louise mentioning Mr. Sohigian's name?

A. No, sir.

Q. Do you ever remember Mr. Sohigian's name being mentioned by anybody else? A. Yes.

Q. By who? A. By Harry and Mose.

Q. When was that?

A. Well, that is another box car deal but I don't know if it was before or after the other one.

Trial Examiner Downing: How close was it in point of time to it?

The Witness: A few days, sir.

Q. (By Mr. Thomas): And what happened? Do you remember what happened at that deal?

A. I heard Harry and Mose going at it strong and I walked in on them and they were arguing about this here deal, that Harry told Mose that Mike Sohigian said that he had [564] been fired on account of union activities at where he worked before, and they were arguing about it. I mean a lot of it I don't understand, because it was fluently Armenian.

Trial Examiner Downing: You don't speak Armenian?

The Witness: I do, sir, but not that well. [565]

(Testimony of Robert Krikorian.)

Cross-Examination

By Mr. Siciliano:

Q. Now, I would like to ask just a few questions about smoking. You say that you smoked and once were caught by the old lady? A. Yes.

Q. Did you ever see anybody else smoke around in the warehouse? A. Yes, sir.

Q. Who did you see smoke? A. Names?

Q. Yes, names.

A. Eddie, Mose, Harry, myself, and Eccles.

Q. Did you ever see Mr. Justice smoke? This is in the [566] warehouse, I am speaking of.

A. That is right. Yes, sir.

Q. You saw him smoke in the warehouse. Did you ever see Mrs. Mosesian, the old lady, smoke in the warehouse? A. Yes, sir.

Q. Did you ever see Mrs. Mosesian smoke outside of the warehouse? A. Outside?

Q. Yes, around the warehouse, that is.

A. Yes, sir.

Q. What did Mr. Justice smoke?

A. Where?

Q. No. What was it?

A. A pipe or a cigar.

Q. And he smoked inside the warehouse?

A. Yes.

Q. You saw smoke coming out of his mouth?

A. Yes, sir.

Trial Examiner Downing: Who did most of the smoking in the warehouse?

(Testimony of Robert Krikorian.)

The Witness: How do you mean, sir?

Trial Examiner Downing: Well, did any one of those that you named smoke more than the others inside the warehouse?

The Witness: No, sir. I mean I guess the way everybody is taking it is that we just smoked one right after the other, [567] but that isn't so.

Trial Examiner Downing: How was it done?

The Witness: Well, when we weren't outside and we were working inside for a long time, we would take a smoke.

Trial Examiner Downing: You smoked, when you felt like smoking?

The Witness: Yes, sir.

Trial Examiner Downing: You didn't smoke all the time, continuously, of course not?

The Witness: No.

Trial Examiner Downing: Did Mr. Justice ever try to stop you from smoking in the warehouse?

The Witness: He has never said anything to me about it.

Trial Examiner Downing: Did he smoke in front of you inside the warehouse?

The Witness: He smoked all around us.

Q. (By Mr. Siciliano): You said on direct examination that you heard Mose sing. Did you see him dance, too? A. Yes, sir.

Q. Did his singing bother you, when you were working, so that you couldn't work?

A. No.

(Testimony of Robert Krikorian.)

Q. Did you ever sing? A. Yes.

Trial Examiner Downing: While at work? [568]

The Witness: Yes, sir. I work better, when I sing.

Q. (By Mr. Siciliano): Did you sing just fairly loudly; that is, loud enough to hear yourself?

A. Yes. I sang plenty loud.

Q. Would you say that Moses sang very, very loud, as far as you were concerned? Did his singing really bother you, or bother you at all?

A. No, sir.

Trial Examiner Downing: Did he sing louder than you did?

The Witness: Well, I wouldn't say that. I wouldn't be a judge of that.

Trial Examiner Downing: What language did you sing in?

The Witness: Me?

Trial Examiner Downing: Yes.

The Witness: American.

Trial Examiner Downing: Did you sing any Armenian songs?

The Witness: Myself? Just parts of them, what I have heard.

Trial Examiner Downing: Did you sing any Turkish songs?

The Witness: No, sir. I don't know Turkish.

Q. (By Mr. Siciliano): Were you ever reprimanded by Louise for singing?

A. Yes, I was once.

Q. What did she say to you?

(Testimony of Robert Krikorian.)

A. She says, "If you want to sing, go home and sing." [569]

* * *

Q. I would like to go into this box car incident. When you were all in the box car, Louise came in and she asked you about whether anyone had talked to you? That is right, isn't it? [570]

A. That is right.

Q. And then she asked each of you individually, if you had joined the Union?

A. That is right.

Q. Had you joined the Union, when she asked the question? Had you signed cards?

A. I had signed cards.

Q. All right. So that when she asked the question, to your knowledge, had the others, Eddie and Mose, signed cards, too?

A. Yes, sir.

Q. Did the Union officials tell you not to talk?

A. Absolutely.

Q. And when she asked you the question about whether you had seen anybody and about whether you had joined the Union, you said, "No"?

A. That is right.

Q. Did she say to you that she would find out who signed?

A. Yes, sir.

Q. What did she say?

A. She says, "I know who has already signed," she says, "but you don't have to tell me. I am going to find out, anyway."

Q. Now, you mentioned in the second incident with regard to the argument between Mose and

(Testimony of Robert Krikorian.)

Eddie or, rather, Harry, you say that you came up on the argument? They had been arguing, [571] when you came up?

A. That is right. That is the way I recall it.

Q. I realize that. How did it end? Did Harry leave and go away? A. Yes.

Q. What did he say, as he left?

A. He was going to have Mose fired.

Q. And did you see him go away?

A. Yes. He walked away.

Q. In what direction?

A. Toward the office.

Q. You didn't see him go into the office?

A. No, sir, I didn't.

Q. Do you know whether he talked to Louise?

A. No, I don't.

Q. Later that same day did you happen to see Louise? A. Yes, sir.

Q. What did you say to her?

Mr. Thomas: Wait a minute, Your Honor. What has this got to do with the cross-examination? It is beyond the scope of the cross-examination.

Trial Examiner Downing: I believe you developed the incident when Harry and Mose had the argument.

Mr. Thomas: That is right, but we didn't develop anything that happened between this witness and Louise. [572]

Mr. Siciliano: This is a natural subsequence that seems to fit in there.

(Testimony of Robert Krikorian.)

Trial Examiner Downing: I will overrule the objection.

Q. (By Mr. Siciliano): What did you say to Louise, after this argument and after Harry had gone there?

A. Well, don't say that Harry had gone there, because I don't know.

Q. I realize that, but when you saw Harry go in that direction?

A. I asked Louise if she was going to fire Mose, and she said, "No. He is a good worker."

Q. She said, "He is a good worker"?

A. That is right.

Q. And what else did you say to her?

A. That is all. [573]

* * *

Q. Did Louise say anything to you about the election, how to vote, or anything with regard to the election?

A. Well, there was one time that I remember. I mean this is not a special meeting, but we happened to meet each other in the warehouse, and she said, "I know you will vote against the Union," she said, "but how about Eddie?" That is all [574] I remember.

Q. What did you answer?

A. That Eddie would vote the same as I would.

Q. And that was all?

A. That is all I remember.

Trial Examiner Downing: How long was that before you quit?

(Testimony of Robert Krikorian.)

The Witness: About a month, sir.

Trial Examiner Downing: About a month?

The Witness: Yes, sir.

Trial Examiner Downing: At that time did you know that there was going to be an election?

The Witness: Well, I knew that it would be coming up, sir, but I didn't know when. I know that that follows the procedure.

* * *

Redirect Examination

By Mr. Thomas:

Q. Bob, when you say that all smoked, did they smoke before any of the Mosesians, all your warehousemen? A. No, sir.

Q. They all smoked behind their backs, as I would take it? A. Yes, sir. [575]

* * *

W. H. JUSTICE

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Thomas:

Q. Do you hire the warehousemen at the warehouse, Mr. Justice? A. I do not.

Q. Do you fire the warehousemen?

A. I do not.

* * *

(Testimony of W. H. Justice.)

Q. What do you do at the warehouse?

A. General operating manager, which consists of office work the same as an office manager, receiving and shipping clerk, loading cars being loaded and shipped out, seeing that the merchandise is placed in the proper place in the warehouse, [577] and seeing that it is stacked properly.

Q. Do the men ever present any complaints to you about their working conditions?

A. They have not.

Trial Examiner Downing: I am a little in the dark as to the relevancy of the line of questioning there as to his duties, in view of the previous concession on the record that this witness was a supervisor.

Mr. Thomas: If your Honor please, the purpose of this line of questioning is to show that Mr. Justice had nothing to do with any of the labor relations in the warehouse, had nothing to do with the smoking in the warehouse, nothing to do with censoring the men in connection with their smoking.

Trial Examiner Downing: Is it still conceded that he is a supervisor within the meaning of the Act?

Mr. Thomas: I think that is a legal conclusion to be drawn from the facts, your Honor.

Trial Examiner Downing: Well, I understood that there was a concession before me on the record. Now, is there or is there not? If there isn't, we have an issue on it then.

Mr. Thomas: I am raising no issue on it.

Trial Examiner Downing: Well, is it conceded

(Testimony of W. H. Justice.)

that he is a supervisor?

Mr. Thomas: I will concede that he is a supervisor.

Trial Examiner Downing: All right. [578]

* * *

Q. Mrs. Mosesian, Louise, and Mary are the ones that contact the warehousemen and tell them what their working conditions are, is that correct?

A. They do the hiring. I have nothing to do with that whatsoever.

Q. Would you have anything to do with whether or not they would smoke in the warehouse?

A. Not necessarily, other than precautionary methods when they were smoking.

Q. Did you ever caution the regular warehousemen not to smoke in the warehouse?

A. I have. [579]

* * *

Q. Did the Mosesians ever tell you about any rule against smoking in the warehouse?

A. They did not.

Trial Examiner Downing: Did you understand from that, that it was proper for you to smoke in the warehouse?

The Witness: I smoked in the warehouse and I wasn't told not to.

Q. (By Mr. Thomas): Where did you smoke in the warehouse, Mr. Justice?

A. It would be in the aisle ways.

Q. Did you ever smoke between the stacks?

A. No.

Q. Did you smoke in the office of the warehouse?

(Testimony of W. H. Justice.)

A. I did.

Q. What do you smoke, Mr. Justice?

A. Either a pipe or a cigar.

Q. Do you walk around with your pipe unlit any part of the time? A. I do.

Q. You walk around with your cigar unlit any part of the time? A. I do. [580]

Q. How much of the time would you say, when you go into the warehouse—I withdraw that question.

Would you say that your pipe is usually lit when you go into the warehouse? A. No.

Q. It is usually unlit? A. Usually unlit.

Q. Do you generally carry your pipe into the warehouse? A. I do.

Q. If you do not smoke, you do not take your cigar into the warehouse?

A. Maybe I got your question wrong.

Q. I say, you do not take your cigar out into the warehouse?

A. Yes, I have had my cigar in my mouth in the warehouse, sure.

Trial Examiner Downing: Lit or unlit?

The Witness: Both.

Q. (By Mr. Thomas): Which are they, most of the time?

A. More times unlit than lit.

Q. When you take your pipe out into the warehouse, how do you carry your pipe, Mr. Justice?

A. Generally carry my hand over the bowl this way.

(Testimony of W. H. Justice.)

Q. In other words, the bowl of the pipe is covered?

A. Practically so, yes, sir. That is my natural way of carrying my pipe. [581]

Q. Do you ever caution your itinerant help not to smoke in the warehouse? A. I have.

Q. Do you ever caution the ranch hands not to smoke in the warehouse? A. I have.

Q. This was done purely as a precautionary measure? A. That is right.

Q. Would it be your job or the Mosesians' job to tell the men about whether or not they should smoke in the warehouse?

A. That should be their job.

Q. Well, is it?

A. Well, that hasn't been brought up in my presence, so I wouldn't know.

Q. They have never told you about this rule?

A. No.

Mr. Thomas: That is all.

Trial Examiner Downing: Any cross-examination? [582]

* * *

Trial Examiner Downing: There is one matter I should like to mention, in view of the previous ruling which I made. May I see the exhibits?

Earlier in the case, at the conclusion of the General Counsel's case, the Trial Examiner granted a portion of the Respondent's motion to dismiss two sub sections of the Complaint; namely, Sub Sections IV (1) and IV (2) with the statement that

if the Respondent's evidence laid any foundation for an amendment, the General Counsel would be at liberty to make such an amendment or offer such an amendment.

Now, in that connection, it appeared to the Trial Examiner that the testimony of the witness Bob Krikorian may [583] in some respects have laid a possible foundation for paragraph IV (1) of the Complaint.

Mr. Bamford: General Counsel moves that paragraph IV (1) be reinstated, sir. Thank you, sir.

Trial Examiner Downing: Any objection from the Respondent?

Mr. Thomas: Yes, your Honor. I object to reinstating that IV (1). I don't quite see how Mr. Krikorian's statement there——

Trial Examiner Downing: I am not making any finding at this point. However, there was a portion of his testimony that——

Mr. Thomas: There was one passing statement.

Trial Examiner Downing: That is right. That might possibly support that paragraph. Any objection to the amendment? I am not finding that it is proved or disproved, but in view of my previous ruling I do feel that it is incumbent to call it to the attention of the parties. [584]

* * *

Mr. Thomas: I wish to make on motion at this time, your Honor.

Trial Examiner Downing: Proceed.

Mr. Thomas: I would like to move that the Complaint with regard to the discharge of Moses

Machoian for union activities be dismissed, since there has been absolutely no showing on the part of the General Counsel's office connecting up any union activities with any discharge that has been made here and there has been direct, positive testimony of the reason for which he was discharged.

Trial Examiner Downing: The motion will be denied. [585]

* * *

TWODI P. MOSESIAN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

(Whereupon, the witness having been duly sworn through the Interpreter, Aram D. Manuelian, the following questions were propounded in English, translated into Armenian, and answers were given from Armenian into English.) [595]

Direct Examination

* * *

By Mr. Thomas:

Q. Who hired him?

A. I gave him—I hired him at our porch when Mr. and Mrs. Machoian, Harry and Mrs. Ekzoozian and Louise were present.

* * *

Q. Can you tell the court what was said by you, by the wife, and by Mr. Machoian at the time he was hired relative to his employment?

(Testimony of Twodi P. Mosesian.)

A. I told him that he should not smoke around in the warehouse, it was dangerous, and I repeated it three times.

Q. Did Mr. Machoian say anything?

A. He said that he would not smoke. He promised that [596] he would not smoke.

Q. Did you ever see Machoian smoking in the warehouse?

A. I saw him smoking on several occasions but then I did not think that it would become a matter of litigation.

Q. Did you ever warn him against his smoking?

A. I would tell him, "Moses, do not smoke."

Q. Did Mr. Machoian say anything when you told him not to smoke?

A. He would look—rather stare at me like a statue and wouldn't say anything.

Q. When you warned him, was anyone else present?

A. Harry Ekzoozian.

Q. Who was working with Machoian the day he was fired?

A. Ekzoozian.

* * *

Q. Did you catch Machoian smoking in the warehouse on the morning of that day?

A. Yes. That morning, yes. I took the cigarette away from his hand and crushed it and threw it on the floor, and Harry was present. [597]

Q. Did Machoian say anything?

A. No, he did not say anything—nothing. I told him that if I seen him again it would be the last time, I would have to discharge him.

(Testimony of Twodi P. Mosesian.)

Q. Where did you go after you left Machoian and Harry?

A. I came home and laid down.

Q. Did you go back into the warehouse office first?

A. Yes.

Q. Who was present in the warehouse office?

A. Violet, Louise, Mary and myself.

Q. Did you say anything to them about Machoian?

A. When I went in, Violet asked me, "Momma, why are you angry?" I told her that I saw the man smoking again and it aggravated me.

Q. Did anything else happen in the afternoon of that day?

A. Yes.

Q. Would you please tell the court what happened in the afternoon of that day?

A. I went back to the warehouse. I saw him smoking again. I didn't want to tell him anything for fear he may throw a cigarette around and cause some damage, but then and there I made up my mind that I was going to fire him at the end of the day, and then I said that I didn't want to sustain any damages and have the insurance companies involved in a thing like that. [598]

Trial Examiner Downing: Who said?

Mr. Manuelian: She thought to herself; that is what she thought at the time. [599]

* * *

Q. Now, did you send Violet out to talk to Machoian?

A. She went to call him. He did not come. The

(Testimony of Twodi P. Mosesian.)

workers all were going away, were going out and I walked out and reached him ten feet away from the office.

Q. Was anyone else present when you talked to Machoian?

A. No. Only him and I. The other workers had gone, had left.

Q. What did you tell Machoian?

A. I told him, "You are a dangerous man and I don't want you to be around the place, and because of your smoking, I have to send you away. I have to discharge you."

Q. What did Machoian say?

A. He said he was working there only for a short period of time. [600]

* * *

Q. (By Mr. Thomas): Did you say anything to Violet, Mary or Louise about Machoian?

A. I told them that I had discharged him and they said, "Well, that is your authority or business, that is your job." [601]

* * *

Q. (By Mr. Thomas): While Machoian was in your employ, did you ever talk to anyone about the union?

A. No, never. I have not discussed it with anybody.

Q. Did you ever talk to anyone about the warehousemen joining the union?

A. No, because at no time I knew that they were or were not members of the labor union.

(Testimony of Twodi P. Mosesian.)

Q. Did you know that your men were joining the union? A. No.

Q. Did you ever talk to your cleaning lady about Eddie joining the union?

Mr. Bamford: May I suggest he be named?

Mr. Thomas: She wouldn't understand. That is why I used the name that way.

Q. (By Mr. Thomas): Did you ever talk to Agnes about Eddie joining the union? A. No.

Q. Did you ever talk to Agnes about Machoian joining the union?

A. No, no. No such thing was discussed in the house. I don't discuss those things with her, so she can attend to the housework. [603]

* * *

Q. Do you know Michael Sohigian?

A. Yes.

Q. Does he visit at your house?

A. Sometimes he comes as a friend.

Q. Did he ever visit at your house during the time that Machoian was in your employ?

Mr. Manuelian: She did not recall that.

Trial Examiner Downing: I did not hear the answer.

Mr. Manuelian: As a matter of fact, she does not remember.

Q. (By Mr. Thomas): Did Mr. Sohigian and you ever discuss Mr. Machoian?

A. The only thing he told me, that I had a crazy Armenian who was wasting a lot of pipes. I reprimanded—

(Testimony of Twodi P. Mosesian.)

Mr. Manuelian: I didn't get that word, reprimanded [606] him or fired him.

Trial Examiner Downing: Is she quoting Sohigian?

Mr. Manuelian: Yes. [607]

* * *

Cross-Examination

By Mr. Bamford:

Q. At the time Moses Machoian was working for you, did you smoke?

A. I would go around the warehouse and come to the office, [608] smoke in the office and then go out.

Q. But you did not smoke in the warehouse?

A. No. If I smoked, the others would see me smoking; they would do likewise.

Q. Did you ever see Mr. Justice smoke in the warehouse?

Mr. Manuelian: Excuse me. She goes on and rambles.

A. He hauls the pipe in his mouth, but does not smoke, just like a child would have something in his mouth to, you know, chew on it.

Q. (By Mr. Bamford): But she, on no occasion, ever saw Mr. Justice actually smoke a pipe or a cigar in the warehouse?

A. I have not seen him smoke. The cigar he smokes in the office. He has a pipe in his [609] mouth——

* * *

In the United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

STATE CENTER WAREHOUSE & COLD
STORAGE COMPANY,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 203.87, Rules and Regulations of the National Labor Relations Board—Series 5, as amended (redesignated Section 102.87, 14 F. R. 78), hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, “In the Matter of State Center Warehouse & Cold Storage Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 431, AFL,” the same being Case No. 20-CA-228, before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating George A. Downing Trial Examiner for the National Labor Relations Board, dated February 14, 1950.

(2) Stenographic transcript of testimony taken before Trial Examiner Downing on February 14, 15, 16, and 25, 1950, together with all exhibits introduced in evidence.

(3) Copy of Trial Examiner Downing's Intermediate Report, dated May 8, 1950 (annexed to item 8 hereof); order transferring case to the Board, dated May 8, 1950, together with affidavit of service and United States Post Office return receipts thereof.

(4) Respondent's exceptions to the Intermediate Report and Recommended Order, dated May 23, 1950.

(5) Respondent's telegram, dated May 24, 1950, requesting extension of time for filing brief.

(6) Copy of Board's telegram, dated May 26, 1950, granting all parties extension of time for filing briefs.

(7) Respondent's request of extension of time to file brief in support of statement of exceptions, received May 29, 1950. (Already granted, see item 6 above.)

(8) Copy of Decision and Order issued by the National Labor Relations Board on August 24, 1950, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 16th day of January, 1951.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary,
NATIONAL LABOR
RELATIONS BOARD.

[Endorsed]: No. 12815. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. State Center Warehouse & Cold Storage Company, Respondent. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed: January 22, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

[Title of Court of Appeals and Cause.]

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, State Center Warehouse & Cold Storage Company, its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of State Center Warehouse & Cold Storage Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 431, AFL, Case No. 20-CA-228."

In support of this petition the Board respectfully shows:

(1) Respondent is a California corporation engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with

this Court herein, to which reference is hereby made, the Board on August 24, 1950, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, its officers, agents, successors, and assigns. So much of the aforesaid order as relates to this proceeding provides as follows:

Order

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that State Center Warehouse & Cold Storage Company, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, AFL, or in any other labor organization of its employees, by discriminatorily discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment;

(b) Interrogating its employees concerning their union membership or activities or as to voting in the election; threatening its employees with ascertaining who are union members; threatening to close or rent the warehouse because of union activities; threatening replacement of its employees if they

join the Union; or in any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole Moses Machoian in the manner set forth in the section entitled "The Remedy" for any loss of pay he may have suffered from the date of Respondent's discriminatory discharge to January 24, 1950;

(b) Upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due and the right of reinstatement under the terms of this Order;

(c) Post at its warehouse in Fresno, California,

copies of the notice attached hereto and marked Appendix A.⁸ Copies of said notice to be furnished by the Regional Director for the Twentieth Region, after being signed by a representative of the Respondent, shall be posted by the Respondent, immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

(3) On August 24, 1950, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(4) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evi-

⁸In the event this Order is enforced by a decree of a United State Court of Appeals, there shall be inserted before the words "Decision and Order," the words "Decree of the United States Court of Appeals Enforcing."

dence, findings of fact, conclusions of law, and order of the Board.

Therefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon so much of the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondent, its officers, agents, successors, and assigns to comply therewith.

By /s/ A. NORMAN SOMERS,
Assistant General Counsel,

NATIONAL LABOR
RELATIONS BOARD.

Dated at Washington, D. C., this 16th day of January, 1951.

Appendix A

Notice to All Employees

Pursuant to A Decision and Order

of the National Labor Relation Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in Interna-

tional Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, AFL, or any other labor organization of our employees, by discriminatorily discharging or refusing to reinstate any of our employees, or discriminate in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

We Will Not interrogate our employees concerning their union membership or activities or as to voting in the election; we will not threaten to ascertain who are members of the union; we will not threaten to close or rent the warehouse because of union activities, nor threaten to replace our present employees if they join the union.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, AFL, or any other labor organization, to bargain collectively in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

We Will make whole Moses Machoian, for any loss of pay suffered as a result of the discrimination against him.

All our employees are free to become, remain or refrain from becoming or remaining members of said union or any other labor organization except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act. We shall not discriminate in regard to hire, tenure of employment, or any other term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

Dated:

STATE CENTER WAREHOUSE & COLD
STORAGE COMPANY (Employer),

By

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Endorsed]: Filed January 23, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

In this proceeding petitioner, National Labor Relations Board, will urge and rely upon the following points:

1. The Board's findings of fact are supported by substantial evidence on the record considered as a whole.

2. The Board's conclusions of law that Respondent violated Sections 8(a)(1) and (3) are in accord with the applicable statute and judicial decision.

3. The Board's order is in all respects **valid and proper**.

4. A decree should be entered enforcing the Board's order in full.

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations
Board.

Washington, D. C.

[Endorsed]: Filed January 23, 1951.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

The President of the United States of America

To: State Center Warehouse & Cold Storage Company, 747 R Street, Fresno, California, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, 1059 T Street, Fresno, California.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U. S. C. A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 22nd day of January, 1951, a petition of the National Labor Relations Board for enforcement of its order entered on August 24, 1950, in a proceeding known upon the records of the said Board as

“In the Matter of State Center Warehouse & Cold Storage Company and International-Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 431, AFL., Case No. 20-CA-228”

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 22nd day of January in the year of our Lord one thousand, nine hundred and fifty-one.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

Return of Service attached.

[Endorsed]: Filed February 8, 1951.

[Title of Court of Appeals and Cause.]

ANSWER TO THE PETITION FOR THE EN-
FORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The State Center Warehouse & Cold Storage Company, a California corporation, hereinafter sometimes referred to as the "Company," in accordance with the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. 111, Sec. 151, et seq.), hereinafter referred to as the "Act," answers the petition presented to the Honorable Court for the enforcement of a certain order issued by the National Labor Relations Board, hereinafter referred to as the "Board" against the Company. The proceeding in which the said order was issued by the Board is known upon the records of the Board as "In the Matter of State Center Warehouse & Cold Storage Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 431, A.F.L., Case No. 20-CA-228."

1. In answer to the said petition of the Board to this Honorable Court, the Company respectfully:

a. Admits the allegations of paragraph numbered 1 in said petition, except that it denies the commission of unfair labor practices as therein alleged;

b. Admits that the Board on August 24, 1950, issued and entered the order directing the Company which is more particularly set forth in paragraph numbered 2 of said petition, but denies that the findings of fact and conclusions of law were duly stated;

c. Admits the allegations of paragraph numbered 3, of said petition.

2. In further answer to said petition of the Board, the Company respectfully alleges that the Board's order is in excess of its power because it did not state its rulings, findings of fact and conclusions of law as required by the Act and the Administrative Procedure Act, and more particularly alleges that:

a. The Board failed as required by Section 8(b) of the Administrative Procedure Act to make a ruling or finding on each exception made by the Company to the Trial Examiner's intermediate report;

b. The Board has not stated its findings of fact as required by Section 10(c) of the Act, but has instead under the designation of "Findings of Fact" presented conclusions of fact unsubstantiated by the evidence mixed together with erroneous conclusions of law:

c. The Board has not made its findings of fact upon the preponderance of evidence as required by Section 10(c) of the Act.

3. In further answer to said petition of the Board,

the Company respectfully alleges that the findings of fact of the Trial Examiner, to which the Company excepted in its Exceptions to the Trial Examiner's Intermediate Report and Recommended Order, are not supported by the evidence.

4. In further answer to the said petition of the Board, the Company respectfully alleges that the ultimate findings of fact of the Board upon which its order is based are not supported by, but are contrary to the evidence, and more particularly, alleges that the evidence does not support the following findings of the Board in said matter:

a. The finding that Louise Mosesian made inquiries in the box car as to the employees' Union membership, made a statement, that she already knew who had signed and threatened to obtain the information elsewhere and stated or threatened on that occasion that her mother could always shut down the warehouse or rent it out;

b. The finding that Mrs. Mosesian sent a message to Ejadian, delivered through Azidigian, that if the warehouse became Union, she would release those (Union) workers and get others;

c. The finding that the Company discharged Machoian because of his Union membership and activities.

5. In further answer to said petition of the Board, the Company respectfully alleges:

That the Trial Examiner by reason of his use of matters not in evidence and his misquotation of,

misstatement of, and coloring of, the testimony all of which was acknowledged by the Board, has disqualified himself as a tester of the credibility of the witnesses, and therefore, the Company respectfully requests that such findings of fact made by him, and adopted by the Board that are based upon conflicting testimony be subjected to an independent determination by the Court.

6. In further answer to said petition of the Board, the Company respectfully alleges that the conclusions of law of the Board as to the legal effect of the findings of fact were erroneous and more particularly that the Board was erroneous in its conclusions of law that the statements found by the Board to have been made by Company officials constituted interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act.

7. In further answer to the petition of the Board, the Company respectfully alleges that it was not afforded a fair hearing for the reasons that:

a. The Trial Examiner was biased;

b. The Trial Examiner and the Board considered matters not in evidence and based their findings thereon.

8. In further answer to said petition of the Board, the Company respectfully alleges that the portions of the order of the Board set forth in the allegations of paragraph numbered 2 in said petition and more particularly paragraph 1(a) and (b) and paragraph 2(c) of said order therein set forth

shall not be enforced for the reason that the policies of the Act will not be effectuated by the enforcement of said cease and desist order, more particularly because:

a. There is no evidence to support the Trial Examiner's determination that there exists the danger that the alleged violations of Section 8(a)(1) of the Act would be continued in the future;

b. The alleged violations of Section 8(a)(1) of the Act allegedly occurred about two years ago and there is no evidence that such violations have continued;

c. No need is shown for such order.

9. In further answer to the said petition of the Board, the Company respectfully alleges that the Board acted without and in excess of its power in making and entering its conclusions of law and order in this matter by reason of the lack of evidence of the matters hereinabove more particularly set forth.

10. In further answer to the said petition of the Board, the Company respectfully alleges that objection was urged before the Board, as to the lack of evidence to support findings of the nature hereinbefore complained of as being without evidence to support them.

Wherefore, the Company prays this Honorable Court that it deny enforcement of, and set aside the said order of the Board in whole, or, if such prayer be denied that it deny enforcement of, and set aside

the said order of the Board in such part as the same is not supported by evidence, as is hereinbefore in this answer set forth with more particularity, and deny and set aside all or such portion of said order as will not effectuate the policies of the Act, and, insofar as so denied and set aside, that the Court relieve the Company, its officers, agents and representatives of any necessity to comply therewith.

Dated: Feb. 7, 1951.

STATE CENTER WAREHOUSE & COLD
STORAGE COMPANY,

By /s/ TWODI P. MOSESIAN,
President.

/s/ HOWARD B. THOMAS,
Counsel for State Center Warehouse & Cold Storage Company.

[Endorsed]: Filed February 9, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
RESPONDENT INTENDS TO RELY

In this proceeding respondent, State Center Warehouse & Cold Storage Company, will rely upon the following points:

1. The Board has not complied with the procedural requirements of the Administrative Procedure Act and the National Labor Relations Act.

2. The Board's findings of fact are not supported by substantial evidence on the record as a whole.

3. The Board's conclusions of law that respondent violated Sections 8(a)(1) and (3) are erroneous.

4. The Board's order is not valid and proper.

5. The respondent was not afforded a fair hearing.

6. A decree should be entered denying enforcement of the Board's order in full or in part.

/s/ HOWARD B. THOMAS,
Counsel for Respondent.

[Endorsed]: Filed February 9, 1951.

No. 12815

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

STATE CENTER WAREHOUSE AND COLD STORAGE
COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,

General Counsel,

DAVID P. FINDLING,

Associate General Counsel,

A. NORMAN SOMERS,

Assistant General Counsel,

FREDERICK U. REEL,

MARSHALL J. SEIDMAN,

Attorneys,

National Labor Relations Board.

FILED

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U.S. COURT OF APPEALS

CLERK

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12815

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

STATE CENTER WAREHOUSE AND COLD STORAGE
COMPANY, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This proceeding is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondent on August 24, 1950 (90 N. L. R. B. No. 300; R. 69-71), pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, Sec. 151, *et seq.*), herein called the Act.¹ The jurisdiction of the Court is based upon Section 10 (e) of the Act, the unfair labor practices having

¹ Relevant portions of the Act referred to herein appear in the appendix, *infra*, pp. 21-23.

occurred in Fresno, California, within this judicial circuit.²

STATEMENT OF THE CASE

Acting upon charges of unfair labor practices filed by the International Brotherhood of Teamsters, Local No. 431, herein referred to as the Union, the Board issued its complaint which alleged that respondent threatened to close its plant if its employees joined the Union, interrogated its employees regarding their union activities, threatened to discharge them for union membership, and discharged Moses Machoian because of his membership and activity in the Union, in violation of Sections 8 (a) (1) and (3) of the Act (R. 3-7).

Following the customary proceedings, the Board issued its decision finding that respondent had violated Sections 8 (a) (1) and (3) as charged. It ordered respondent to cease and desist from the unfair labor practices found, to post appropriate notices, and to make Machoian whole for any loss suffered as a result of his discriminatory discharge (R. 64-71).

I. The Board's findings of fact and conclusions of law

A. Respondent interrogated and threatened its employees with respect to their union membership in violation of Section 8 (a) (1)

Respondent first heard of its employees' interest in self-organization late in January 1949, when its labor relations consultant, Bob Johnson, informed it

² Respondent is a California corporation engaged in receiving, storing, and shipping agricultural products, groceries, furniture and other merchandise. The value of the merchandise stored exceeds \$100,000, over 60 percent of which was shipped from points outside the State. In addition, respondent acts as local distrib-

that the Union was attempting to organize its employees (R. 19; 133).³ This report was confirmed on February 10, 1949, when the Board notified respondent by mail that the Union had filed a petition for certification as the bargaining representative of respondent's employees (R. 17; 75).

Respondent wasted no time in impressing its employees with its deep hostility to the Union. Shortly after respondent's receipt of the Board's letter, Louise Mosesian⁴ entered a boxcar which was being unloaded by all five of respondent's employees.⁵ She asked the assembled group "if any of [them] had spoken to anybody," apparently referring to the union representative. Replying in unison, they said they had not. Louise then interrogated each of them individually as to his union membership. Each, in turn, denied having joined the Union. Rebuffed by their insistent denials, Louise Mosesian threatened to ferret out the desired information, stating, "I know who has already signed, but you don't have to tell me. I am going to

utor for such nationally advertised products as Clabber Girl Baking Powder, Wesson Oil, and Wyandotte Cleanser. Respondent concedes that it is engaged in interstate commerce and is within the jurisdiction of the Board, as the Board found (R. 15, 75).

³ References preceding the semicolon are to the Board's findings. Those following the semicolon are to the supporting evidence.

⁴ Louise Mosesian, the daughter of respondent's president, is one of the principal stockholders and an officer of the State Center Warehouse and Cold Storage Company (R. 13; 161). She, together with two other officers, was charged with the active management of the enterprise, including disciplinary control of the workmen (R. 15; 161-162).

⁵ These were employees Eccles, Ejadian, Ekzoozian, Krikorian, and Machoian.

find out anyway.” Then, having already revealed respondent’s hostility toward the Union by the tenor of her interrogation, Louise Mosesian gave point to her previous remarks by reminding the men that “Mama⁶ could always shut [the warehouse] or rent it out.” (R. 19–20, 25; 77–80, 252–254, 259.)

Louise Mosesian continued her efforts to ascertain each employee’s feelings with regard to union membership. Shortly before the election, which the Board had scheduled as part of the representation proceeding initiated by the union, she stopped Krikorian in the warehouse and stated, “I know you will vote against the Union but how about Eddie [Ejadian]?” He replied, “Eddie would vote the same as I would” (R. 23; 261).

Mrs. Twodi Mosesian likewise resorted to threats in her effort to defeat the Union. Sometime before the impending election, Mrs. Mosesian directed her housekeeper, Agnes Azidigian, to tell employee Eddie Ejadian⁷ that “If Eddie belonged to Union, [I] don’t keep him.” Mrs. Azidigian delivered this message as instructed (R. 23; 155, 158, 180–181, 184).

The Board concluded that respondent, by the conduct of Louise Mosesian in interrogating its employees and threatening to close the warehouse if they joined the Union, and by the conduct of Twodi Mosesian in threatening to discharge Ejadian if he joined the Union, interfered with, restrained, and coerced

⁶ Mrs. Twodi Mosesian, the president of the State Center Warehouse and Cold Storage Company, is the mother of Louise.

⁷ Mrs. Azidigian was Ejadian’s mother-in-law.

its employees in violation of Section 8 (a) (1) of the Act (R. 66).

B. The discharge of Machoian in violation of Section 8 (a) (3) and (1)

Moses Machoian had been employed by respondent as a warehouse laborer for six months at the time of his discharge. During that period his work had not been criticized. On the contrary, he had been referred to by Louise Mosesian as a "good worker" (R. 261).

Prior to his employment by respondent, Machoian had worked for one Michael Sohigian, a close friend of the Mosesians. While there, he had been the leader of the campaign to organize Sohigian's plant (R. 21; 81, 139). One evening when both Sohigian and employee Ekzoozian were visiting the Mosesians,⁸ the conversation turned to the union activities in respondent's warehouse. In response to an inquiry, Sohigian stated that he had discharged Machoian for organizing the union at his plant. The Mosesians and Sohigian agreed that Machoian was also "the one who organized [respondent's warehouse]"; they were "sure [he was] the one" (R. 21; 81, 113, 255).⁹

⁸ The Trial Examiner found a "close personal and social relationship between Michael Sohigian and the Mosesians and [a] less close, but nevertheless, social relationship existing between Ekzoozian and the Mosesians. It was therefore not unusual for them to meet on social occasions (R. 18-19).

⁹ The conversation at the Mosesians was related to Machoian by Ekzoozian the next day during the course of a quarrel which terminated with Ekzoozian's threat to get Machoian fired because of his union activity and his departure for respondent's office in an apparent effort to carry out his threat (R. 22; 81-84). Although Machoian testified that the conversation of the previous evening with Sohigian was reported to him by Louise Mosesian (R. 21; 81), Louise denied having spoken to Machoian about it,

On April 12, 1949, at closing time, Machoian went to the office to pick up his pay check. As he walked out Twodi Mosesian informed him that he had been discharged. When Machoian inquired as to the reason for her action, she refused to give one, replying contemptuously, "That's my business" (R. 25; 87).¹⁰

In its answer to the Board's complaint Respondent assigned smoking contrary to warehouse rules as the chief and immediate cause of discharge (R. 9). Thereafter, at the hearing before the Trial Examiner, respondent also urged that Machoian was discharged for singing, dancing, and loud talking while at work (R. 32; 116-117). In addition respondent adduced testimony that Machoian suffered some incapacity from an injured finger, although it formally disclaimed that this was an added reason for the discharge (R. 33). The Board, upon considering the several explanations advanced by respondent, found that Machoian was in fact discharged for none of these reasons, but because of his union activity (R. 33-36, 66-67).

and her denial was corroborated by Ekzoozian and Krikorian (R. 21; 172). However, Krikorian, the only wholly disinterested party testifying to this incident, further testified that Ekzoozian made a statement to Machoian similar to that which Machoian attributed to Louise (R. 21-22; 255). From this evidence the Trial Examiner and the Board concluded that the conversation was in fact reported by Ekzoozian (R. 22).

¹⁰ According to Mrs. Mosesian's testimony she told Machoian that he was discharged for smoking. The Trial Examiner and the Board disbelieved this testimony and credited Machoian, for the reasons stated by the Trial Examiner (R. 29-30). Aside from the fact that the issue of credibility was for the Board to resolve, (see *infra*, p. 10, n. 13), the "smoking" excuse, if made, was a pure pretext, as the Board found, *infra*, pp. 7-8.

The "no smoking" rule, upon which respondent primarily relied, "was observed very much in the breach thereof."^{10a} Justice, the general operating manager who himself often smoked in the warehouse, was never informed by respondent that it had any rule against smoking, notwithstanding the fact that Louise Mosesian knew he customarily smoked either a pipe or cigar while at work (R. 26-29, 67; 186-187, 264-266). In fact, testimony adduced by respondent established not only that all of the warehousemen, but even Mrs. Mosesian, herself, smoked in the warehouse. Every employee witness¹¹ agreed that smoking was a common practice. (R. 31; 88-89, 125-130, 189, 225-226, 256-257).

Machoian, like his fellow employees, smoked in the warehouse. Yet no one complained to him about his smoking, or warned him that it was contrary to the rules, or that it might result in his discharge (R. 26, 31, 67; 37). When Mrs. Mosesian observed him smoking she did not even see fit to reprimand him (R. 128). Although Louise Mosesian expressed annoyance at Machoian's smoking, her irritation was not caused by any supposed infraction of a much broken rule, but was solely occasioned by a personal distaste for smoking (R. 175). In fact, at a time when Louise, by her own testimony, knew that Machoian smoked, she stated, in answer to an inquiry by Krikorian as

^{10a} From Judge (now Mr. Justice) Minton's opinion in *R. R. Donnelly & Sons Co. v. N. L. R. B.*, 156 F. 2d 416, 421 (C. A. 7), certiorari denied, 329 U. S. 810, in which alleged violation of a "no smoking" rule was likewise urged as a grounds for discharge.

¹¹ All of respondent's warehousemen with the exception of one, Eccles, testified in this case.

to whether she intended to fire Machoian, "No. He is a good worker" (R. 261). The Board, in the light of this evidence, found respondent's defense that it discharged Machoian for violating its "no smoking" rule "most unpersuasive" (R. 67).

As noted above, respondent also urged, albeit belatedly, that Machoian was discharged for singing, dancing, and loud talking. Although it is true that Machoian on occasion did wax exuberant while at work, he was never disciplined or threatened with discharge for such conduct (R. 32-33; 130-132). Another employee, Krikorian, testified that he too sang loudly in the warehouse, and was merely irritably told by Louise Mosesian, "If you want to sing, go home and sing." (R. 258-259). The latest occasion on which Machoian's exuberance annoyed Louise occurred several months before his discharge (R. 32; 167-169). Moreover, although Louise was apparently the one chiefly annoyed by the noise in the warehouse, she, according to her own testimony, had nothing to do with Machoian's discharge (R. 32-33; 197-199), and her mother, who actually effected the discharge, claimed to have based it on the "smoking" violations (R. 33; 271). The Board therefore rejected respondent's attempt to attribute the discharge to Machoian's exuberance in the warehouse.

The Board found that the true motivation for Machoian's discharge lay in his union activities (R. 67). In support of its findings the Board relied on respondent's open hostility to the Union as evidenced by the Mosesians' threats to close the ware-

house and to discharge a union adherent, on respondent's belief that Machoian was responsible for bringing the Union into the warehouse, on respondent's refusal to give Machoian any reason for his discharge at the time it was effected, and on the shifting and transparently insubstantial reasons thereafter advanced to explain his dismissal (R. 66-67). Accordingly, the Board concluded that by discharging Machoian for his union activities, respondent violated Sections 8 (a) (1) and (3) of the Act (R. 66).

II. The Board's order

The Board ordered respondent to cease and desist from discouraging membership in any union by discriminating in any manner against any of the employees with regard to their hire and tenure of employment; from interrogating its employees concerning their union activities; threatening to ascertain which of its employees are union members; threatening to close the warehouse because of union activities; threatening replacement of employees who join the union; and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by the Act.

Affirmatively, the Board ordered respondent to make Machoian whole for any loss of pay suffered by the discriminatory discharge;¹² upon request, to

¹² Back pay was ordered from the date of the discharge to January 24, 1950, the date when Machoian decided not to return to his former employment (R. 67). Back pay is to be computed in accordance with the "quarterly" formula now customarily prescribed by the Board. *F. W. Woolworth Co.*, 90 N. L. R. B. No. 41 (R. 68).

make available to the Board all records necessary to compute the amount of back pay due; to post appropriate notices of compliance; and to notify the Board within ten days from the date of the order what steps it has taken to comply.

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that respondent violated Section 8 (a) (1) of the Act by threatening to close the warehouse and discharge employees if they voted for the Union and by interrogating them with regard to their union activities?

2. Whether substantial evidence supports the Board's finding that respondent violated Section 8 (a) (3) and (1) by discharging Machoian because of his union activity?

ARGUMENT

I

Substantial evidence supports the Board's finding that respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act

The evidence recited above (pp. 3-4) establishes that respondent interrogated its employees as to their union activity, threatened to close its warehouse if the Union won the representation election, and threatened to discharge an employee if he joined the Union.¹³

¹³ Respondent's denials that these episodes occurred raised a conflict in the evidence which both the Trial Examiner and the Board resolved adversely to respondent. The Trial Examiner in a detailed report noted that "the resolution of questions of credibility [was] especially difficult" in this case (R. 18) and explained the basis upon which he resolved the issues (R. 18-19). Under these circumstances this Court will not "displace the Board's choice between two fairly conflicting views." *Universal Camera Corp.*

Such conduct has consistently been held by the courts to constitute interference, restraint, and coercion of employees in violation of Section 8 (a) (1) of the Act.

Louise Mosesian's direct interrogation of each of the employees as to his union membership and her later attempt to ascertain how some of them would vote in the election (*supra*, pp. 3-4) is conduct uniformly condemned by this and other courts as violative of Section 8 (a) (1). See, e. g., *H. J. Heinz Company v. N. L. R. B.*, 311 U. S. 514, 518; *N. L. R. B. v. Bradford Dyeing Association*, 310 U. S. 318, 327; *N. L. R. B. v. Holtville Ice and Cold Storage Co.*, 148 F. 2d 168, 169 (C. A. 9); *N. L. R. B. v. J. G. Boswell Co.*, 136 F. 2d 585, 590 (C. A. 9); *N. L. R. B. v. Wm. Davies Co.*, 135 F. 2d 179, 181 (C. A. 7), certiorari denied, 320 U. S. 770; *N. L. R. B. v. Dixie Shirt Co.*, 176 F. 2d 969, 971, 973 (C. A. 4); *N. L. R. B. v. Norfolk Southern Bus Corp.*, 159 F. 2d 516, 518 (C. A. 4), certiorari denied, 330 U. S. 844.¹⁴

v. N. L. R. B., 71 S. Ct. 456, 465; see also, *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 597; *N. L. R. B. v. Lettie Lee*, 140 F. 2d 243, 247 (C. A. 9). The amendments to the Act make no change in the standard of review applicable in this Court which "has always applied the attitude reflected in this legislation" (*Universal Camera*, 71 S. Ct. at 466). See *N. L. R. B. v. Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 834; *Willapoint Oyster Co. v. Ewing*, 174 F. 2d 676, 685-686, certiorari denied, 338 U. S. 860; cf. *N. L. R. B. v. Tri-State Casualty Co.*, 27 L. R. R. M. 2505, 2507 (C. A. 10, March 21, 1951).

¹⁴ The Board has stated its position as follows: "Interrogation by an employer * * * invades the employee's privacy and thus constitutes interference with his enjoyment of the rights guaranteed to him by the Act. * * * The employee who is

Similarly, Louise Mosesian's thinly veiled threat, following her attempt to conduct an inquisition into the employees' union affiliation, that "Mama could always shut [the warehouse] or rent it out," and Mrs. Mosesian's direct threat to fire Ejadian if he joined the Union (*supra*, pp. 3-4) are plainly calculated to coerce or restrain the employees in the exercise of their rights under Section 7. Threats of such a nature have been repeatedly held to violate Section 8 (a) (1). See e. g., *N. L. R. B. v. Fruehauf Trailer Co.*, 301 U. S. 49, 55; *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270; *N. L. R. B. v. Reeves Rubber Co.*, 153 F. 2d 340, 341, (C. A. 9); *N. L. R. B. v. Holtville Ice and Cold Storage Co.*, 148 F. 2d 168, 169 (C. A. 9); *N. L. R. B. v. Idaho Refining Co.*, 143 F. 2d 246, 248 (C. A. 9); *N. L. R. B. v. Lettie Lee, Inc.*, 140 F. 2d 243, 249 (C. A. 9); *N. L. R. B. v. Long Lake Lumber Co.*, 138 F. 2d 363, 364 (C. A. 9); *N. L. R. B. v. J. G. Boswell Co.*,

interrogated concerning matters which are his sole concern is reasonably led to believe that his employer not only wants information on the nature and extent of his union activities, but also contemplates some form of reprisal once this information is obtained. * * * He feels a refusal to answer or a truthful answer may cost him his job. * * * Weighing these 'subtle imponderables', the Board early characterized direct interrogation as 'a particularly flagrant form of intimidation of individual employees'. * * * Interrogation cannot be considered an expression of 'views, arguments, or opinions' within [Section 8 (c)]. Moreover, the purpose of that section is to permit an employee to express his views, not to license him to extract those of his employees. The employer is explicitly accorded a right to 'influence' his employees by verbal appeals to reason, but not to fear." *Standard-Coosa-Thatcher*, 85 N. L. R. B. 1358, cited with approval in *Joy Silk Mills Inc. v. N. L. R. B.*, 185 F. 2d, 732, 743 (C. A. D. C.).

136 F. 2d 585, 590 (C. A. 9); *N. L. R. B. v. Polson Logging Co.*, 136 F. 2d 314 (C. A. 9).¹⁵

II

Substantial evidence supports the Board's finding that respondent discriminatorily discharged Machoian in violation of Sections 8 (a) (3) and (1) of the Act

The facts surrounding the discharge of Machoian are clearly sufficient to support the Board's finding that he was discriminatorily discharged. Briefly summarized, the evidence establishes that respondent has a strong anti-union animus; it believed Machoian was the mainspring behind the union activity in its

¹⁵ Contrary to Respondent's contention before the Board, the interrogation and threats found violative of Section 8 (a) (1) were not protected utterances under Section 8 (c) which permits expression of any "views, argument or opinion * * * if such expression contains no threat of reprisal or force or promise of benefit." The threats to close the warehouse and to discharge an employee for union membership are thus clearly outside the area of discussion permitted by Section 8 (c). Interrogation, not being an expression of "views, argument or opinion," has been recognized as a form of interference and intimidation. See n. 14, p. 11, *supra*; see also *N. L. R. B. v. Kropp Forge Co.*, 178 F. 2d 822 (C. A. 7), certiorari denied, 340 U. S. 810; *N. L. R. B. v. La Salle Steel Co.*, 178 F. 2d 829, 832 (C. A. 7), certiorari denied, 339 U. S. 963; *N. L. R. B. v. Gate City Cotton Mills*, 167 F. 2d 647, 649 (C. A. 5).

Respondent's attempted reliance on *Sax v. N. L. R. B.*, 171 F. 2d 769 (C. A. 7) is similarly misplaced. Respondent's persistent interrogation and its threats of discrimination culminating in the actual discriminatory discharge of Machoian can scarcely be characterized as mere "prefunctory, innocuous remarks and queries * * * standing naked and alone." (*Sax* case, *supra* at pp. 772-773). The court which decided the *Sax* case has twice recently taken pains to limit that case to its own extremely narrow ground. See *N. L. R. B. v. La Salle Steel Co.*, *supra* at p. 835; *N. L. R. B. v. Kropp Forge Co.*, *supra* at p. 828.

warehouse; Machoian, whom respondent regarded as "a good worker," was discharged without previous warning and without explanation; and thereafter respondent belatedly offered several implausible explanations for the discharge (*supra*, pp. 5-9).

Each of the elements relied upon by the Board has been recognized by the courts as evidence from which the Board might reasonably draw an inference of discriminatory treatment. When an employer, whose hostility to a union has already led him to threaten a union adherent with discharge because of his membership, and to commit other violations of the Act, discharges an employee whom he believes to be responsible for organizing his plant, it is a justifiable inference that the discharge was related to the employee's union activity. *N. L. R. B. v. Mackay Radio and Telegraph Co.*, 304 U. S. 333, 347; *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 588; *N. L. R. B. v. Morris P. Kirk & Sons, Inc.*, 151 F. 2d 490, 492-493 (C. A. 9). That inference is inescapable where it also appears that the discharge was precipitate without prior reprimand, warning, or discipline, but on the contrary the employee had been characterized as "a good worker." "Such [precipitate] action on the part of an employer is not natural. If the employer had really been disturbed by the circumstances it assigned as reasons for these discharges, and had had no other circumstance in mind, some word of admonition, some caution that the offending lapse be not repeated, or some opportunity for cor-

rection of the objectionable practice, would be almost inevitable. The summariness of the discharges of these employees, admittedly theretofore satisfactory, gives rise to a doubt as to the good faith of the assigned reasons.” *E. Anthony & Sons v. N. L. R. B.*, 163 F. 2d 22, 26–27 (C. A. D. C.), certiorari denied, 332 U. S. 773. See also *N. L. R. B. v. Bradford Dyeing Assoc.*, 310 U. S. 318, 327, 329; *N. L. R. B. v. American Potash and Chemical Corp.*, 98 F. 2d 488, 493 (C. A. 9), certiorari denied, 306 U. S. 643. And, finally, the refusal to give the employee any reason for his discharge furnishes additional ground for finding that the motive was discriminatory. *N. L. R. B. v. Wells, Inc.*, 162 F. 2d 457, 459 (C. A. 9), *N. L. R. B. v. American Potash and Chemical Corp.*, *supra* at p. 493.¹⁶

Respondent in its answer to the complaint alleged violation of the “no smoking” rule as the basis for the discharge. Here, as in *N. L. R. B. v. Bird Machine Co.*, 161 F. 2d 589, 592 (C. A. 1), “the weight to be accorded the inferences drawn by the Board is augmented by the fact that the explanation of the dis-

¹⁶ As the Fourth Circuit stated in the oft-cited *Hartsell Mills* case: “It must be remembered * * * that the question [of motive] involved is a pure question of fact; that, in passing upon it the Board may give consideration to circumstantial evidence as well as to that which is direct; that direct evidence of a purpose to violate the statute is rarely obtainable; and that where the finding of the Board is supported by circumstances from which the conclusion of discriminatory discharge may legitimately be drawn, it is binding upon the courts as they are without power to find facts or to substitute their judgment for that of the Board.” *Hartsell Mills Co. v. N. L. R. B.*, 111 F. 2d 291, 293 (C. A. 4).

charge offered by respondent did not stand up under scrutiny.”

The evidence that not only the manager and all the employees, but even Mrs. Mosesian, herself, smoked in the warehouse, *supra*, p. 7, establishes that the “no smoking” rule was not enforced. The warehouse manager did not even know of its existence, and although all of the employees customarily violated the rule only one of them, not the dischargee, was ever reprimanded therefor. Upon these facts, the Board had clear warrant for rejecting respondent’s contention that Machoian was discharged for smoking (R. 67). Moreover, even assuming, *arguendo*, that respondent suddenly invoked the “no smoking” rule, its use to discharge, without warning, the man believed to be the union leader evidences both an unwarranted severity and a disparity of treatment which the courts have frequently recognized as constituting cogent evidence of discrimination. *N. L. R. B. v. Idaho Refining Co.*, 143 F. 2d 246, 248 (C. A. 9) *N. L. R. B. v. Ford Brothers*, 170 F. 2d 735, 738 (C. A. 6).

Respondent’s belated attempt to attribute Machoian’s discharge to his singing and dancing while at work is, if anything, less persuasive than its attempt to rely on the “no smoking” rule. Indeed, the very manner in which the defense is asserted further supports the Board’s finding of discrimination. Inconsistency in explaining the reason for a discharge has long been regarded as a legitimate factor on which to base an inference that the true reason for the discharge is being concealed. *N. L. R. B. v. Waterman Steam-*

ship Co., 309 U. S. 206, 221, 223; *N. L. R. B. v. Yale and Towne Manufacturing Co.*, 114 F. 2d 376, 378 (C. A. 2). In any event, the record is devoid of evidence that Machoian's singing was in any way related to his discharge, let alone that it was "the moving cause" thereof (*Wells Inc., v. N. L. R. B.*, 162 F. 2d 457, 460 (C. A. 9)). But even assuming that such evidence existed, respondent's discharge of one it believed to be the union leader for so trivial an offense, without prior warning, would only serve to demonstrate further that disparity of treatment which, as noted above, evidences illegal discrimination.

As in *N. L. R. B. v. Robbins Tire and Rubber Co.*, 161 F. 2d 798 at 801 (C. A. 5):

Here there is evidence that the employer was biased against unionization, and the ground of the discharges seems not greatly serious * * * Here, too, the discharged persons are union members who have been active in, or sympathetic toward union affairs * * * [S]ince the cause assigned was not one for which discharges were ordinarily made, or even threatened, the employer's antipathy to union membership, interest, or activity had tipped the balance in the scales of causation and had become the *causa causans*, the real cause of the discharge.

III

The Board's order was valid and proper

Respondent in its answer filed in this Court alleges that "the Board failed as required by Section 8 (b) of the Administrative Procedure Act (60 Stat.

237, 5 U. S. C. 1001, *et seq.*) to make a ruling or finding on each exception made by the Company to the Trial Examiner's intermediate report" (R. 288). We submit that the objection is not well taken.

Section 8 (b) of that Act provides, *inter alia*—

The record shall show the ruling upon each finding, conclusion, or exception presented. All decisions * * * shall * * * include a statement of (1) findings and conclusions, as well as the reasons or basis therefor upon all the material issues of fact, law, or discretion presented on the record. * * *

The nature of the requirements of this section was fully stated in the reports of the congressional committees at the time it was enacted:

The requirement that the agency must state the basis for its findings and conclusions means that such findings and conclusions must be sufficiently related to the record as to advise the parties of their record basis. Most agencies will do so by opinions which reason and relate the issues of fact, law, and discretion. Statements of reasons, however, may be long or short as the nature of the case, and the novelty or complexity of the issue may require.

Findings and conclusions must include all the relevant issues presented by the record in the light of the law involved. They may be few or many. A particular conclusion of law may render certain issues and findings immaterial, or vice versa. (Senate Report 752, 79th Cong. 1st Sess., p. 24; House Report 1980, 79th Cong., 1st Sess., p. 39.)

The Board's decision and order, which except for certain specified particulars adopted the findings and conclusions of the Trial Examiner, fully apprised respondent of the Board's ruling upon the exceptions. As the committee report quoted above establishes, respondent errs in suggesting that the Board was required to state separately its findings of fact or conclusions of law upon each exception filed.

Respondent also urges in its answer that the cease and desist provisions of the Board's order should not be enforced because there is no evidence that respondent has continued to violate the Act (R. 291). Settled authority establishes the Board's right to a judicial decree enforcing its order, even if the respondent has complied therewith. As the Supreme Court recently stated (*N. L. R. B. v. Mexia Textile Mills*, 339 U. S. 563, 567-568):

We think it plain from the cases that the employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court. * * * A Board order imposes a continuing obligation, and the Board is entitled to have the resumption of the unfair practices barred by an enforcement decree * * * the Act does not require the Board to play hide and seek with those guilty of unfair labor practices.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence on the record considered as a whole, that its order is valid

and proper, and that a decree should issue enforcing the order in full as prayed in the Board's petition.

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APRIL 1951.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended by Section 101 of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. Sec. 141 *et seq.*) are as follows:

“RIGHTS OF EMPLOYEES

“SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. * * *

“UNFAIR LABOR PRACTICES

“SEC. 8. (a) It shall be an unfair labor practice for an employer—

“(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; * * *

“(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

“SEC. 8. (c) The expressing of any views, argument, or opinion, of the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

“PREVENTION OF UNFAIR LABOR PRACTICES

“SEC. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall

be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *

“SEC. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because

of extraordinary circumstances. The findings of the Board with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

The relevant provision of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 *et seq.*, is as follows:

“SEC. 8. (b) SUBMITTALS AND DECISIONS.

“* * * The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.”

No. 12,815

IN THE

United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

STATE CENTER WAREHOUSE AND COLD
STORAGE COMPANY,
Respondent.

On Petition for Enforcement of an Order
of the National Labor Relations Board.

BRIEF FOR RESPONDENT.

HOWARD B. THOMAS,
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FILED

MAY 29 1951

PAUL E. O'BRIEN

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No. 12,815

IN THE

**United States Court of Appeals
For the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

STATE CENTER WAREHOUSE AND COLD
STORAGE COMPANY,
Respondent.

**On Petition for Enforcement of an Order
of the National Labor Relations Board.**

BRIEF FOR RESPONDENT.

JURISDICTION.

On October 25, 1949, the General Counsel of the National Labor Relations Board issued on behalf of the Board, pursuant to Section 10(b) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. III, Sec. 151 *et seq.*), hereinafter called the Act, a complaint alleging that Respondent had committed and was committing at Fresno, California, certain acts constituting unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act (R. 3-7). Respondent, in accordance with Section 101.8 of the Board's Statement of Procedure (Tit. 29,

Code of Federal Regulations, Subtitle B, Ch. I, Sec. 101.8), filed with the Board an answer denying commission of unfair labor practices (R. 7-9). After hearing the Board's Trial Examiner issued an Intermediate Report and Recommended Order (R. 10-44), as required by Section 101.45 of the Board's Statement of Procedure. Respondent excepted to the Intermediate Report and Recommended Order pursuant to Section 101.46 of the Board's Statement of Procedure (R. 64-73). The Board, on August 24, 1950, issued against Respondent a Decision and Order, 90 N.L.R.B. No. 300, ordering Respondent to cease and desist from certain conduct and to take specified affirmative action (R. 64-71). In this proceeding the Board petitions the Court for enforcement of its Order pursuant to Section 10(e) of the Act.

STATEMENT OF THE CASE.

I. SUMMARY OF FACTS.

The evidence in this case consists almost entirely of the testimony of Respondent's officers, of four men whom Respondent at material times employed as warehousemen and of the mother-in-law of one of them, of one of Respondent's office girls, of Respondent's general operating manager, and of Michael Sohigian, a supervisor at a firm known as Industrial Scientific Company. Some of the testimony was in conflict and that of several witnesses was confused and self-contradictory. This may have been due partially to unfamiliarity of some of the witnesses with

the English language (R. 15-16), or to the unreliability of some of the witnesses, especially Moses Machoian (R. 18-19). It therefore is difficult to reconstruct the facts in this case from the record. The summary which follows has necessarily been assembled only in part from uncontradicted testimony.¹

A. Background of the case.

Respondent is a small family corporation which operates one warehouse located at Fresno, California (R. 4, 8). Respondent is managed by Mrs. Twodi P. Mosesian, a widow, with the assistance of her daughters, Louise Mosesian and Mary Mosesian (R. 161-162, 197-199, 208). Respondent's warehouse building contains offices and storage space and has an open loading platform from which railroad cars are loaded and unloaded (R. 86, 88, 240). Respondent regularly employs only four or five men in its warehouse. During the period material to this case, Respondent's warehousemen were Moses Machoian, Eddie Ejadian, Bob Krikorian, Harry Ekzoozian, and Bill Eccles (R. 17), the first four of whom testified at the hearing before the Trial Examiner. Respondent employed W. H. Justice as its general operating manager (R. 263).

Late in January, 1949, Respondent was notified by a labor relations consultant, one Bob Franklin, that Local No. 131 of the International Brotherhood of

¹Where the testimony conflicts as to an incident included in this statement, citations to contradictory testimony follow the symbol "cf." Citations to the Intermediate Report of the Trial Examiner or to the Board's decision and Order follow the semicolons in the references to the record.

Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as the Union) was seeking to organize the warehouse (R. 133). Franklin advised the Mosesians that it was necessary for Respondent to have a representation election (R. 134). The Mosesians instructed Franklin to take the necessary steps for the holding of a representation election. On February 10, 1949, a letter from the Board was mailed to Respondent informing it that the Union had filed a representation petition. The election took place March 10, 1949. On March 18, 1949, the Board certified the Union as the bargaining representative of Respondent's warehouse and truck driver employees (R. 17).

B. The alleged unfair labor practices.

Respondent does a general warehouse business (R. 14-15) in the course of which it commonly stores inflammable goods (R. 98-99). Therefore, Respondent has for thirty years maintained stencilled "No Smoking" signs inside the warehouse which are visible to anyone working in the warehouse (R. 162-164, 196). Mrs. Mosesian hires the warehouse employees, and when she does so she instructs them not to smoke inside the warehouse (R. 223, 224, 246-247, 252, cf. R. 88-89; 27). W. H. Justice, Respondent's general operating manager, also warns the employees not to smoke inside the warehouse (R. 264, 266). The employees, or some of them, sometimes (R. 88) smoked inside the warehouse in violation of these instructions (R. 126-128, 225, 256), but they were careful not to do so in front of the Mosesians (R. 252, 262). They feared

that they would be discharged if caught smoking (R. 246). Mrs. Mosesian and Louise Mosesian each reprimanded the men whenever they caught them smoking (R. 192-194, 252, 269). Shortly before the period involved in this case, Respondent discharged an employee named Bob Mirikian for smoking in the warehouse (R. 217; cf. R. 31).

On or about November 18, 1948, Moses Machoian, in the company of his wife and of Harry Ekzoozian and his wife, visited Mrs. Mosesian at her home. Machoian asked for a job in Respondent's warehouse. Mrs. Mosesian hired Machoian and told him that there was no smoking in the building (R. 165-167, 226-227, 268-269; cf. R. 89, 99-101). Machoian had previously worked at Industrial Scientific Company, where his boss was Michael Sohigian (R. 97). Machoian was discharged by that firm because of his inefficiency (R. 141-142) and possibly because he was dissatisfied with the pay (R. 97-98).

Despite Respondent's "No Smoking" signs and warnings against smoking in the building, Machoian smoked inside the warehouse almost from the date he was hired (R. 88, 141, 192-195, 227-228, 269). He was repeatedly reprimanded by Louise Mosesian and Mrs. Mosesian, but nevertheless persisted (R. 175, 193-195, 269, cf. R. 88). Machoian also sang and danced inside the warehouse (R. 90, 252, 257-258; 32). In December, 1948, shortly after he was hired, Louise Mosesian heard Machoian singing Turkish songs at the top of his lungs. She came out of the office into

the warehouse proper and saw Machoian snapping his fingers and jumping about. She reprimanded him for this conduct (R. 167-169, 232, cf. R. 130-131; R. 32), as she had similarly reprimanded Krikorian (R. 258-259). Nevertheless, Machoian on later occasions indulged in singing and dancing inside the warehouse during working hours, and was again reprimanded by Louise (R. 169-170). Louise reported Machoian's smoking, singing and dancing to Mrs. Mosesian, who had the final say on hiring and firing employees (R. 161-162, 170, 197-198).

In January, 1949, the warehouse employees became interested in Local No. 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The lead in organizing the men was taken by employee Krikorian (R. 119-121; 66). The men actually joined the Union at the end of January (R. 79; 17).

Just after New Year's Day, 1949, Michael Sohigian, Machoian's former boss, stopped in to visit the Mosesians at their home. Employee Ekzoozian and his wife were also present. During the course of a general conversation Louise Mosesian mentioned that one of Respondent's employees indulged in singing and dancing, and also smoked in violation of the warehouse rule against smoking. Mr. Sohigian then said that he had had a similar employee, whose work had been most unsatisfactory. They then discovered that Machoian was the person that each had in mind (R. 136-139, 140-142).

The next day, apparently, or a few days thereafter (R. 170-171, 236-237, 242-245, cf. R. 81, 255), Ekzoozian, while at work in a box car, told Machoian that he had seen Mr. Sohigian the night before at the Mosesians' home and that Sohigian had said that he had discharged Machoian because of his inefficiency (R. 243-244). Machoian then may have accused Ekzoozian of having told the Mosesians that Machoian had been in Union activities at Industrial Scientific Company and that he had been discharged there because of such activities (R. 82-83, 255, cf. R. 236-237, 240-241, 243-244). A loud argument developed. The noise attracted Louise Mosesian, who merely told the men to get to work (R. 170-175, 237, 240, 242, cf. R. 255, cf. also R. 80-81). Ekzoozian then left the box car in anger, saying that he was going to get Machoian fired and headed towards Respondent's office (R. 83-84, 260, cf. R. 237, 241).² However, it does not appear

²The Trial Examiner evidently concluded that this box car incident occurred at a later date, sometime in February, 1949 (R. 20-22), rather than about the first of the year. Respondent concludes that this incident occurred about the first of the year because Ekzoozian testified that the night before the incident, Mr. Sohigian told him that Machoian had broken material at his plant (R. 243). The only occasion testified to in this case on which Sohigian made any statement to Ekzoozian about Machoian was the occasion of Mr. Sohigian's visit to the Mosesians discussed above, which occurred about the end of 1948. Krikorian testified (R. 255) he did not know whether this box car incident, which involved the argument between Ekzoozian and Machoian, had occurred before or after another box car incident with reference to which the Trial Examiner (R. 20-22) fixed the date of the incidents here discussed, apparently on the basis of Machoian's testimony (R. 81). Respondent's chronology of this incident, and not the Trial Examiner's, is correct, since all the testimony concerning this incident, including that of Machoian, refers to an argument which occurred between Machoian and Ekzoozian over

that Ekzoozian actually got to the office or talked to any of the Mosesians about Machoian (R. 83-84, 260-261). Later the same day, employee Krikorian asked Louise Mosesian if she was going to fire Machoian, and she answered, "No, he is a good worker." (R. 261).

Machoian and Krikorian testified (R. 77-80, 108, 114-116, 253-255, 259) to another box car incident which apparently occurred sometime between January 15, 1949 and March 1, 1949. Machoian and Krikorian testified that on this occasion, the warehousemen, Machoian, Ejadian, Ekzoozian and Krikorian, were working in a box car, when Louise Mosesian came into the car and asked if anyone had spoken to anybody. Everyone said, "No." She then is said to have asked each man individually if he had joined the Union. Each said, "No." She then is supposed to have said, "I know who has already signed, but you don't have to tell me. I am going to find out anyway." According to Krikorian's testimony, she then asked Ekzoozian whether Mama (Mrs. Mosesian) had not always kept four or five men working in the warehouse, even in tough times, and Ekzoozian agreed. Finally, she is supposed to have said, "Mama could always shut it or rent it out, the warehouse." Louise Mosesian, on the other hand, testified that she had never during the period of Machoian's em-

statements supposed to have been made by Sohigian to Ekzoozian very recently. Nevertheless, for the sake of clarity, the box car incident in which the argument occurred will hereinafter be referred to as the second box car incident, and the other box car incident will be referred to as the first box car incident.

ployment talked to the men in the box car, except once when she found Machoian and Ekzoozian arguing. This apparently was the second box car incident already discussed, when Machoian and Ekzoozian argued about whether Sohigian was in town and what he had said. She testified that she merely stopped the argument in order to get the men to work (R. 172-174). Ekzoozian testified that Louise had talked to the men in the box car, but only to urge them to work, and that she had never mentioned the Union to the men (R. 234-236, 240-241). Ejadian could not remember whether Louise had ever mentioned the Union to him (R. 153-154).

The only occasions before the election other than those already discussed upon which any of the Mose-sians directly or indirectly mentioned the Union to the employees were once before the election, when Louise Mosesian said to Krikorian that she knew he would vote against the Union, and asked him how Ejadian would vote (R. 261), and again, on or about the date of the election, when Mary Mosesian told the men that that was the election date and that they were to vote as they pleased (R. 123-124, 208, 232-233, 271). After the election the Union was never mentioned at all to the employees other than Ejadian (R. 84). There was testimony that after Machoian's discharge, sometime in May or June, 1949, Mrs. Mosesian told her housekeeper, Agnes Azidigian, that if Eddie Ejadian, Agnes' son-in-law, or the other workers belonged to the Union, she would discharge them

and get better workers, and that she should tell Ejadian this. Machoian was not mentioned in this conversation. Mrs. Azidigian testified that she repeated this statement to Ejadian some time later (R. 179-184, cf. R. 155-160). Mrs. Mosesian denied having made any such statement to Mrs. Azidigian (R. 272).

On April 12, 1949, which was a pay day, Mrs. Mosesian discharged Machoian. In the morning, Mrs. Mosesian saw Machoian smoking in the warehouse and reprimanded him. He put his cigarette out. In the afternoon, she again found Machoian smoking in the warehouse. She went into the office and told Violet Misikian, an office employee, to go into the warehouse and tell Machoian to come into the office before going home. Violet then went into the warehouse and told Machoian that when he got his pay check at the end of the day, he was to come into the office to see Mrs. Mosesian. Machoian, however, did not come into the office at quitting time, so Mrs. Mosesian went out to the platform just as he was leaving and told him he was discharged. He then went to his car where Ekzoozian, who rode to and from work with him, was waiting, and told Ekzoozian that Mrs. Mosesian had told him not to come back to work. The testimony was in conflict as to whether or not Mrs. Mosesian gave Machoian any reason for his discharge (R. 84-87, 211-216, 220-223, 228-232, 269-271, cf. R. 104-107).

C. The Intermediate Report and the Board's Order.

The Intermediate Report of the Trial Examiner held that Respondent engaged in interference, restraint and coercion, within the meaning of Section 8(a)(1), as follows: by Louise Mosesian's inquiries and statements to the warehousemen in the box car, by Louise Mosesian's statement to Krikorian that she knew he would vote against the Union in the election and her inquiry of him as to how Ejadian would vote, and by Mrs. Mosesian's message to Ejadian that if the warehouse became Union, she would discharge the present employees (R. 25). The Report further held that Respondent had not discharged Machoian for smoking or for singing and dancing (R. 30, 32, 33), that Respondent's "series of shifting and implausible reasons * * * fail to explain Machoian's discharge on a nondiscriminatory basis" and that the assertion of such reasons pointed to a discriminatory motive in the discharge (R. 34). With respect to the affirmative evidence of discriminatory discharge required to carry the burden of proof thereof (Section 101.10, of the Board's Statement of Procedure) the Report stated that the Mosesians knew that Machoian took the lead in Union activities, that employee Ekzoozian had threatened to have Machoian fired, and that Respondent "was determined from the outset to defeat Union organization in the warehouse" (R. 35-36).

The Recommended Order recommended that Machoian, who did not wish reinstatement (R. 90; 37), be given back pay for a period after his discharge, that Respondent cease and desist from committing

unfair labor practices, and that Respondent post a notice to employees that it would not discourage Union membership (R. 37-44).

Respondent filed written exceptions to the findings of fact and conclusion of law in the Report and to the Recommended Order (R. 45-63). The Board in its Decision and Order (R. 64-71) did not state findings of fact. It agreed that Respondent had violated Section 8(a)(1) of the Act by Louise Mosesian's statements in the box car and by Mrs. Mosesian's message through Mrs. Azidigian to Ejadian (R. 66). The Board did not agree that Respondent had no rule against smoking or that Machoian was the leader in Union activities in Respondent's warehouse. Nevertheless, the Board found that Respondent discriminatorily discharged Machoian. The Board held the discriminatory discharge to have been established by Respondent's anti-Union animus, as shown by threats and interrogation, by belief of Respondent's officers that Machoian brought the Union into the warehouse, and apparently by the unpersuasiveness of Respondent's defense (R. 66-67). There was no statement of the reasons for or basis of the Board's findings, nor was there a finding of danger that Respondent would commit future unfair labor practices. The Board substantially affirmed the Recommended Order of the Trial Examiner (R. 69-73), without passing upon Respondent's exceptions.

II. QUESTIONS PRESENTED.

1. Did Respondent discriminate in regard to the hire or tenure of employment of Moses Machoian for the purpose of discouraging membership in any labor organization, or did Respondent discharge Moses Machoian because of his persistent disregard of Respondent's working rules and regulations?

2. Did any of Respondent's officers ever engage in interference, restraint and coercion of employees in the exercise of the rights guaranteed in Section 7 of the Act, within the meaning of Section 8(a)(1) of the Act?

3. Was Respondent denied a fair hearing in this case by reason of the bias of the Trial Examiner and of the National Labor Relations Board?

4. Is the Board's order improper because there is no showing that there is danger that Respondent will engage in unfair labor practices?

5. Is the Board's order invalid because it does not show the Board's ruling on each of Respondent's exceptions and because it does not include a statement of the reasons or basis for the Board's findings and conclusions, as required by Section 8(b) of the Administrative Procedure Act, 60 Stat. 242, 5 U.S.C. Sec. 1007(b) ?

6. Is the Board's order invalid because the Board did not state its findings of fact as required by Section 10(c) of the National Labor Relations Act?

SPECIFICATION OF ERRORS.**I. THE DISCRIMINATORY DISCHARGE ISSUE.**

The Board erred in respect of the discriminatory discharge issue in finding contrary to the preponderance of the testimony taken:

1. That the Respondent discriminatorily discharged Moses Machoian in violation of Section 8(a)(3) of the Act.

2. That Respondent did not discharge Moses Machoian because he persisted in smoking in violation of Respondent's working rule and because he sang and danced in Respondent's warehouse during working hours (R. 167-170, 175, 187-188, 192-199, 211-216, 220-223, 227-232, 252, 269-271; 66-67).

3. That Respondent's officers believed that Machoian was responsible for bringing the Union into the warehouse (R. 139-143, 148-152, 176, 255, 260-261, 271; 66).

4. That during the period of Machoian's employment, Respondent's no smoking rule was rarely enforced (R. 216-217, 225, 246, 252, 262; 67).

5. That Machoian was never warned that smoking in the warehouse would result in his discharge (R. 187, 192-196, 269; 67).

6. That Machoian was not told that he was discharged because he smoked in Respondent's warehouse (R. 271; 67).

7. By implication, that Respondent's officers had an "anti-Union animus" (R. 253-254, 261, 272; 66).

II. THE INTERFERENCE, RESTRAINT AND COERCION ISSUE.

The Board erred in respect of the interference, coercion and restraint issue in holding and finding contrary to the preponderance of the testimony taken:

1. That the Respondent interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act.

2. That Respondent's officers, Louise Mosesian and Twodi Mosesian, interrogated Respondent's employees as to Union activities and threatened to close the warehouse (R. 175, 254, 271; 66).

3. That Louise Mosesian and Twodi Mosesian made any coercive statements and indulged in coercive conduct (R. 175, 254, 271; 66).

III. THE BIAS ISSUE.

The Board erred in respect of the bias issue: in adopting and affirming the Intermediate Report and Recommended Order of the Trial Examiner, although it was demonstrated in Respondent's exceptions to such Order and Report that the Trial Examiner was biased against Respondent (R. 45-63).

IV. THE ISSUE WITH RESPECT TO THE PROPRIETY AND VALIDITY OF THE BOARD'S ORDER.

The Board erred:

1. In issuing a cease and desist order against Respondent, although it did not find and there is no

evidence that there is danger that Respondent will continue its alleged violations of the Act (R. 64-67).

2. In failing in its Decision and Order to state the reasons or basis for its findings and conclusions, as required by Section 8(b) of the Administrative Procedure Act (R. 64-67).

3. In failing in its Decision and Order to make a ruling upon each exception presented by Respondent to the Intermediate Report and Recommended Order, as required by Section 8(b) of the Administrative Procedure Act (R. 64-67).

4. In failing to state its findings of fact, as required by Section 10(c) of the Act (R. 64-67).

ARGUMENT.

This case is primarily an evidence case. The decision of this Court upon the first three issues will depend upon the result of the Court's study of the record in the case. The Court, in making this study and in drawing its conclusions therefrom, will, however, no longer be bound by the former rule that it must affirm the Board's order if it can find evidence in the record to support the order. See *N.L.R.B. v. Waterman Steamship Corp.*, 309 U.S. 206, 60 S. Ct. 493 (1940). The findings of the Board are now conclusive with respect to questions of fact only "if supported by substantial evidence on the record considered as a whole." Section 10(e) of the Act. In

Universal Camera Corp. v. N.L.R.B., U.S., 71 S. Ct. 456 (1951), the Court noted that under Section 10(e) as it read prior to its 1947 amendment by the Taft-Hartley Act, the courts held that findings of the Board must be affirmed if “the reviewing Court could find in the Record evidence which, when viewed in isolation, substantiated the Board’s findings.” *Id.*, 459. The Court held that this rule of affirmance had been changed by the 1947 amendment of Section 10(e) in the Taft-Hartley Act and by the Administrative Procedure Act. The Court said that new legislation “definitely precludes” a reviewing court from determining “substantiality of evidence supporting a labor board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence, or evidence from which conflicting inferences could be drawn.” *Id.*, 464. The Court said that a reviewing court “is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view.” *Id.*, 465. Reviewing courts must now evaluate the worth of the testimony of witnesses since the Board’s findings must “be set aside when the record before a Court of Appeals clearly precludes the Board’s decision from being justified by a fair estimate of the worth of the testimony of witnesses or it conforms judgment on matters within its special competence, or both.” *Id.*, 466.

Respondent's position is that there is no evidence in the record to support the holding that Respondent committed unfair labor practices, so that enforcement of the Board's order should be denied under any theory of the scope of review. Under the new theory of a broad scope of review, as announced by the Supreme Court in the *Universal Camera* case, supra, this Court will find the evidence overwhelmingly against the conclusions that unfair labor practices occurred and that the record demonstrates that the Board's order should not be enforced in any respect.

I. THE FINDING OF THE BOARD THAT RESPONDENT DISCRIMINATORILY DISCHARGED MOSES MACHOIAN IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE, OR BY ANY EVIDENCE AT ALL, BUT ON THE CONTRARY, THE EVIDENCE SHOWS THAT RESPONDENT DISCHARGED MACHOIAN FOR CAUSE.

The Board had the burden of proof throughout this proceeding to establish that Respondent discriminatorily discharged Machoian. When and if the Board introduced sufficient evidence which if uncontested or unrefuted would establish a discriminatory discharge, then the Respondent had a burden of coming forward with evidence that the discharge was not discriminatory. *Montgomery Ward and Company v. N.L.R.B.*, 107 F. (2d) 555 (C.C.A. 7th, 1939); *N.L.R.B. v. Fruehauf Trailer Company*, 301 U.S. 49, 57 S. Ct. 642 (1937). The first question, therefore, is whether the Board introduced evidence which, if

it stood alone, would have established that Respondent discriminatorily discharged Machoian.

A. THERE IS NO AFFIRMATIVE EVIDENCE TO SUSTAIN THE CONCLUSION THAT RESPONDENT DISCRIMINATORILY DISCHARGED MOSES MACHOIAN.

Insofar as it is possible to determine from the Board's Decision and Order what were its findings of fact with respect to the issue of discriminatory discharge, it appears (R. 66-67) that the Board found facts showing that Respondent discriminatorily discharged Machoian in the following particulars:

(1) Respondent's officials had an "anti-Union animus."

(2) The credited testimony of Krikorian and Sohigian showed that Respondent's officers believed that Machoian brought the Union into Respondent's warehouse.

(3) Respondent's defense that it discharged Machoian for smoking is most unpersuasive.

These findings of fact are similar to those of the Trial Examiner. He found (R. 35) that the Mosesians were aware that Machoian was the leader in bringing the Union into the warehouse. In support of this finding he cited testimony of Mr. Sohigian that he had discussed Machoian's Union activities with the Mosesians, employee Ekzoozian's accusation of Machoian as the Union organizer, and Ekzoozian's threat to have Machoian fired for Union activities. The Trial Examiner also relied upon Respondent's

determination to defeat Union organization, as shown by statements, inquiries and threats of Respondent's officers and by Mrs. Mosesian's message to Ejadian that if the warehouse became Union, she would get other workers (R. 35-36). The Board, in substance, adopted these findings with the exception that it refused to adopt the finding that Machoian took the lead in bringing the Union into the warehouse.

The essential affirmative elements of the Board's case are, then, its findings that Respondent's officials opposed organization of the warehouse and that Respondent's officials believed that Machoian was taking some part in the organization of the warehouse. If the first of these elements is not supported by the record then there is no finding in the record to show that Machoian's discharge could have been discriminatorily motivated, and the conclusion of discriminatory discharge falls. Further, if the finding of anti-Union animus finds support in the record, but the finding that Respondent believed Machoian was active in Union organization is not supported, the conclusion that Machoian was discriminatorily discharged must fall. If it is shown only that an employer is opposed to Union organization of his plant and that certain of his employees who were discharged were Union members, then a charge of discriminatory discharge may not stand. *N.L.R.B. v. Goodyear Tire and Rubber Co.*, 129 F. (2d) 661 (C.C.A. 5th, 1942); *N.L.R.B. v. Montgomery Ward & Co.*, 157 F. (2d) 486 (C.C.A. 8th, 1946).

Examination of all the testimony in the record which bears upon the Board's affirmative case shows that the Board's finding that the Mosesians believed that Machoian organized the warehouse is not supported by substantial evidence on the record considered as a whole. The testimony of the witnesses relevant to this finding may be summarized as follows:

Mr. Sohigian testified that he discussed Machoian with Louise Mosesian on more than one occasion; that he was of the impression that the first occasion was a visit by him to the Mosesians' house during the holiday season at the end of 1948; that on this occasion it was mentioned in conversation that someone working at Respondent's warehouse indulged in offensive conduct, smoking and singing loudly, that this employee was Machoian, that Machoian had worked under Mr. Sohigian, and that Mr. Sohigian had discharged Machoian for incompetence and inefficiency (R. 140-142). Sohigian testified that he did not remember definitely whether or not he had on this occasion discussed Machoian's Union activities with the Mosesians (R. 151). Sohigian testified that he had discussed Machoian—without saying in what respects—with Louise Mosesian and with the other Mosesians on a subsequent occasion at the Mosesians' home, but that he could not fix the date of this occasion even approximately (R. 143). He did not remember whether on this occasion an N.L.R.B. election was discussed, although it could have been discussed then (R. 147). He said that Machoian's Union ac-

tivity also could have been discussed on this occasion (R. 148). Sohigian testified that on some occasion or occasions he discussed both the election and Machoian's Union activities with Louise Mosesian, but that he could not recollect independently whether or not Machoian was discussed at the same time that the election was discussed or whether the discussion of Machoian occurred before or after the discussion of the election (R. 148-152). He did not testify as to the content of his discussion with the Mosesians of Machoian's Union activity. He did not know whether the discussion of the election came up before or after it occurred because he did not know if the election ever had occurred (R. 152). Mr. Sohigian was apparently confronted with a statement to which he may have sworn for the purpose of refreshing his recollection (R. 143-148). In this statement Mr. Sohigian was supposed to have said, "Sometime before the Union election at State Center Warehouse Cold Storage Company Louise Mosesian telephoned me" (R. 144). Mr. Sohigian said that this statement did not refresh his recollection on a second meeting with Louise Mosesian and that he had no independent memory of any such meeting (R. 144). Mr. Sohigian said further that the statement, "refreshes my mind only insofar as—well, I can't point out exactly here" (R. 148).

The testimony of Machoian, so far as relevant, can be summarized as follows: He testified that he became interested in joining a Union, but that Re-

spondent never said anything to him about it (R. 76, 122); that he decided to join the Union in January, 1948 (R. 119) (the witness must have meant 1949); that he started talking about the Union first to Bob [Krikorian] (R. 120); that after he talked to Krikorian then Krikorian "started talking to the other fellows and we come all together and went over to the Union and signed up" (R. 121). Machoian testified that on a certain occasion in a box car, Louise Mosesian asked him if he had signed any papers, said that Respondent didn't want "union in this," and then said she was going over to the Union to find out if he joined the Union (R. 77-81, 108, 114-115); that on a later occasion Louise Mosesian again spoke to him in a box car and said that Machoian had organized for the Union at Mr. Sohigian's place of business and that Machoian had organized the warehouse (R. 81, 113). Machoian testified that immediately after this second speech to him by Louise, he accused employee Ekzoozian of telling the Mosesians that he had been discharged by Mr. Sohigian by reason of Union activities (R. 83), that they argued about this, and that Ekzoozian then left the box car, apparently for Respondent's office, saying that he was going to tell Respondent to lay Machoian off because the "Union can't work any more over here" (R. 83). Machoian testified that Mr. Sohigian had discharged him "for the Union," although Mr. Sohigian had not said so to him when he discharged him (R. 97-98).

Employee Ejadian testified only that Krikorian talked to him about the Union and that Machoian talked to him later on (R. 53).

Employee Ekzoozian testified that Mr. Sohigian had said to him one evening, apparently prior to any box car incident, that Machoian had worked in his, Sohigian's, plant and "broke the die, broke the pipe over there" (R. 243), and that nothing else was said by Mr. Sohigian on that occasion or at any other time previously about Machoian (R. 243, 245). Ekzoozian testified that he told Machoian about this the next day (R. 244), and that the ensuing box car argument about which Machoian testified was over whether or not Mr. Sohigian was out of town, and whether or not Ekzoozian had told the Mosesians that Machoian had been an inefficient worker under Mr. Sohigian (R. 236-237, 240-245).³ Ekzoozian further testified that Louise Mosesian had never spoken to the employees about the Union or about Mr. Sohigian (R. 235-236, 240-242).

Krikorian testified to an incident in a box car between the middle of January and the end of February, 1949, in which Louise Mosesian asked the men if they were Union members, said she would find out, asked if Mrs. Mosesian had not always kept men working in the warehouse, and said that Mrs. Mosesian could always shut or rent the warehouse (R. 253-

³This incident was the incident referred to in the Statement of Facts as the second box car incident.

255).⁴ Krikorian testified that he had never heard Louise Mosesian mention Mr. Sohigian's name, but that he had heard Ekzoozian and Machoian discussing Sohigian. He testified that he heard them arguing in a box car, on an occasion before or after that just mentioned, and apparently that Machoian accused Ekzoozian of telling the Mosesians that Machoian had been discharged by Mr. Sohigian for Union activities.³ Krikorian was unable to understand this argument fully, inasmuch as it occurred in fluent Armenian and he did not understand it that well (R. 255). Krikorian testified that after this argument he saw Ekzoozian go in the direction of the warehouse office, but that he did not know whether Ekzoozian actually went there or talked to any of Respondent's officers. Krikorian testified that later in the day he asked Louise Mosesian if she was going to fire Machoian and that she answered, "No, he is a good worker." (R. 260-261.)

The testimony of Mrs. Mosesian, Louise Mosesian and Mary Mosesian on the subject of Machoian's discharge is devoted, for the most part, to establishing Respondent's defense, which will be discussed hereinafter. With respect to the affirmative elements of the Board's case, Louise Mosesian testified that on the occasion of Mr. Sohigian's visit about the end of 1948, when Machoian was discussed, nothing was said about Machoian's Union activities (R. 138); that

⁴This incident was the so-called first box car incident.

she had never discussed the Union or Union activities with Machoian at any time (R. 175); that she did not know that Machoian was interested in the Union during the time he was employed or that he was carrying on any Union activities, and further that she did not try to find out (R. 176-177). She testified with respect to the box car incidents that on an occasion right after lunch on a day in January, 1949, she heard a big argument going on, went into a box car, and told the men to get to work (R. 171-175). When asked whether Mrs. Mosesian would listen to employee Ekzoozian if he recommended that someone was not doing his job, she testified that Mrs. Mosesian would not take such a recommendation into account (R. 207). Mary Mosesian testified that the only time she had ever discussed the Union with Machoian or anyone else was on the day of the election or the day before, when she told the men that "Today is election day in the afternoon. Yes was in favor of the Union, No was in favor of the warehouse, non-union. They could vote as they pleased, as they saw fit" (R. 208). This testimony was corroborated by that of Ekzoozian (R. 233). Mrs. Mosesian testified that she never talked to anyone about the Union, or about the warehousemen joining the Union because she at no time knew that they were or were not members of the Union (R. 271-272).

The foregoing summary sets forth every shred of evidence contained in the record that bears in any way upon the discriminatory discharge of Machoian, other than testimony relevant to Respondent's affirm-

ative defenses. Plainly, the only testimony on which the Board could rely to establish the vital fact of knowledge in Respondent that Machoian was in the Union was Machoian's own testimony as to Louise Mosesian's accusation in the box car on the occasion of the "second" box car incident (R. 81, 113), and Sohigian's testimony that, on a certain occasion some time after that of his first visit with the Mosesians, he discussed Machoian's Union activities with the Mosesians (R. 149-152). Krikorian never gave any testimony which showed belief on the part of Respondent that Machoian organized the warehouse. The most Krikorian testified to was a threat by employee Ekzoozian followed the same day by Louise Mosesian's statement that Machoian would not be fired!

The testimony of Machoian that Louise accused him of organizing the warehouse must be disregarded, if the Trial Examiner's judgment as to the credibility of witnesses is to be given any weight. The Trial Examiner had a low opinion of Machoian's credibility (R. 19). With respect specifically to the second box car incident, when the accusation was supposed to have been made, the Examiner believed Krikorian's testimony that Louise Mosesian never came to the box car at all on that occasion, and therefore necessarily concluded that she never accused Machoian of organizing the Union (R. 22). Indeed, as pointed out above in the Statement of Facts, footnote 2, the second box car incident occurred early in January or even before the end of 1948, just after

Mr. Sohigian's first visit at the Mosesians and before any of Respondent's employees had even become interested in the Union.

Mr. Sohigian's testimony boils down merely to a statement that at some time or other he discussed Machoian's Union activities with Louise Mosesian. He was unable to say whether this discussion occurred before or after the Union election at Respondent's warehouse, whether it occurred before or after some conversation concerning the election, when the conversation concerning the election took place, or whether the election had ever taken place.

The entire record, then, can be searched in vain for anything to support the statement of the Board in its Decision and Order that "the credited testimony of Krikorian and Sohigian established that the Respondent's officials believed that Machoian was responsible for bringing the Union into the warehouse" (R. 66). The affirmative evidence relied upon by the Board to establish discriminatory discharge even fails to establish that Respondent's officers ever had any idea before his discharge that Machoian was a member of the Union. Respondent, of course, was aware of Union activities inasmuch as a representation election took place during the period of Machoian's employment, and there was some testimony that Louise Mosesian asked the men who were Union members and said that she was going to find out. Is this enough to establish knowledge in Respondent that Machoian was a Union member? Is this enough

to establish a discriminatory discharge? The answer to these questions must be No. As has been pointed out, under the Act as it stood prior to 1947, to establish discriminatory discharges, it was insufficient merely to show anti-Union animus and that Union members were discharged.⁵ No testimony connected any such animus with Machoian's discharge, even circumstantially. The Board did not carry its burden of proof of discriminatory discharge.

Respondent submits that under the rule for review announced in *Universal Camera Corp. v. N.L.R.B.*, U.S., 71 S. Ct. 456 (1951), the record before this Court "clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses, or its informed judgment on matters within its special competence, or both." The only testimony in support of the decision is that of two witnesses, Machoian and Sohigian, the first of whom was impeached (R. 116) and the second of whom was not shown ever to have told the Mosesians that Machoian brought the Union into his place of business or into Respondent's warehouse (R. 151). Affirmative evidence of a discriminatory discharge is totally lacking from this record.

⁵Respondent will discuss fully in the next section of this Argument, which deals with interference, restraint and coercion, the alleged acts relied on to show the animus. It is there demonstrated that these acts probably did not occur, that if they did occur they occurred about January 15, 1949, three months before Machoian's discharge, and that if they occurred they were not unfair labor practices.

B. RESPONDENT DISCHARGED MACHOIAN BECAUSE HE SMOKED WHILE AT WORK IN RESPONDENT'S WAREHOUSE DESPITE WARNINGS TO DESIST, AND BECAUSE HE SANG AND DANCED DURING WORKING HOURS.

Since the Board did not sustain its burden of proof of discriminatory discharge, the burden of coming forward with a defense never passed to Respondent. But, if the burden of coming forward had passed to Respondent, Respondent would have sustained it, since the testimony overwhelmingly demonstrates that Machoian was discharged for cause.

In order to show that Machoian's smoking was a cause for his discharge, the record must show (a) that Respondent had and enforced a rule against smoking, (b) that Machoian knew of this rule, (c) that he violated the rule, and (d) that the violations caused his discharge. Perusal of the Summary of Facts set forth above in this Brief and of the citations there made to the record to supporting and contradictory testimony demonstrates each of these facts. The Trial Examiner, however, found that Respondent had no rule against smoking (R. 26-27), that if there was such a rule it was disregarded with impunity (R. 31), that Machoian was suddenly discharged (R. 31) and that no reason was assigned therefor (R. 29-30). The Board found that Respondent had a rule against smoking, but that "the vast preponderance of the credited testimony" showed that the rule was "rarely enforced" and that this defense was "most unpersuasive" (R. 67). Therefore, we shall here discuss in detail the evidence which shows that Respond-

ent had a rule against smoking which was enforced and for the violation of which Machoian was discharged.

1. Respondent had a rule against smoking inside the warehouse which was enforced.

The record shows that there were stenciled "No Smoking" signs on the pillars of Respondent's warehouse building which were visible to anyone in the warehouse (R. 196). Respondent also maintained other "No Smoking" signs which the employees tore down or defaced from time to time (R. 163-165). The record shows that every employee was warned by Mrs. Mosesian about smoking in the warehouse when hired—except, of course, Machoian (R. 223, 224, 246, 252, cf. R. 88-89). Common sense required such a rule, since inflammables were stored in the warehouse (R. 98-99), and moreover the Mosesians had in 1947 suffered a large fire loss by reason of a cigarette (R. 185).

Was this rule enforced and observed, or was it "consistently and universally disregarded by all of the employees" (R. 31)? The following summaries of the testimony of Respondent's employees and of W. H. Justice shows that the rule was enforced and observed.

Machoian's testimony that Respondent's rule against smoking was "observed very much in the breach thereof" was as follows (R. 87-88):

Q. Mr. Machoian, did you ever smoke in the warehouse?

A. Well, we smoke on the——

Q. Wait a minute. Who is “we”?

A. All the people.

Mr. Thomas. Answer the question.

Q. (By Mr. Siciliano). Tell me their names. Who are they?

A. Eddie Ejadian.

Mr. Thomas. You asked a specific question, Counsel. Have the witness answer the question.

Trial Examiner Downing. You were asked if you smoked. That was the question.

The Witness. I smoked lots of times on the platform. Everybody smoked.

Mr. Thomas. Answer the question yes or no.

Q. (By Mr. Siciliano). Did you smoke?

A. Yes, sometimes.

Q. Where?

A. On the platform.

Q. Did you ever smoke inside the warehouse?

A. Sometimes we smoked inside.

Trial Examiner Downing. The question is, did you smoke inside?

The Witness. Sometimes.

Q. (By Mr. Siciliano). O.K. I am talking about you, alone, nobody else, just you.

A. Yes, sometimes I smoked inside.

Q. All right. Now did you ever get any complaints, did anybody ever tell you, about your smoking?

A. Not a one of them. They didn't say any complaint. They didn't tell me nothing at all.

Machoian further testified that Krikorian smoked in front of Mrs. Mosesian lots of times (R. 126); that he smoked in front of Louise Mosesian and she didn't

say a word, that he didn't know, that he never heard (R. 126-127); and that he only saw Krikorian smoke in front of Mrs. Mosesian once but that she said nothing (R. 122-128). Machoian testified that he never saw Ejadian smoke in front of either Mrs. Moosesian or Louise Mosesian (R. 127); that "I can't see them all, but I did see they all smoking over there" (R. 127); and that when he and Krikorian smoked in front of Mrs. Mosesian (whether in the warehouse or on the platform outside was not clear) she said nothing (R. 126, 128). He testified at first that when he smoked in front of Mrs. Mosesian he was not in the warehouse, then he said he was in the warehouse or on the platform, and finally, simply, "The warehouse" (R. 128). He testified that Mr. Justice smoked inside (R. 89), that Mr. Justice did not smoke between the stacks (R. 129), and that Mr. Justice did smoke between the stacks (R. 130).

Ejadian, in answer to a question whether he ever saw Mr. Justice smoke in the warehouse said, "Yes" (R. 247). He testified that if he smoked inside the warehouse he would be fired (R. 246).

Ekzoozian testified, in answer to a question as to how many of the men working with him smoked in the warehouse, that "I just see one smoking. That is my partner. Just one." He testified that Machoian was his partner and that Machoian smoked cigarettes (R. 225, 227, 228). Concerning Mr. Justice, Ekzoozian testified, "I always see a pipe in his mouth, but I don't know if he smokes or not," that he did not

know if Justice's pipes were lit, and that he never saw Justice with a cigar or cigarette in his mouth (R. 226).

Krikorian testified that he did not smoke in front of Mrs. Mosesian if he could help it; that she only caught him once and thereupon reprimanded him (R. 252). In answer to the question, "Did you ever see Mose Machoian smoke in the warehouse?" he said, "Yes" (R. 252). In answer to the question, "Did you ever see Mr. Justice smoke * * * in the warehouse," Krikorian said, "Yes" (R. 256). In answer to the question whether he ever saw Mrs. Mosesian smoke in the warehouse, he answered, "Yes" (R. 256). With respect to the ordinary warehouse employees, Krikorian testified that he had seen them smoking in the warehouse (R. 256), but that they did not smoke before any of the Mosesians but smoked behind their backs (R. 262).

W. H. Justice testified that he smoked in the warehouse and in the aiseways, but that he never smoked between the stacks of goods (R. 264); that his pipe was "usually unlit" when he went into the warehouse and that he had his cigar in his mouth in the warehouse "more times unlit than lit" (R. 265). He testified that he cautioned the regular warehousemen not to smoke in the warehouse (R. 264) and that he cautioned itinerant help not to smoke in the warehouse (R. 266). He testified that he did not hire and fire warehousemen (R. 262) and that it would be up to the Mosesians to tell the men whether or not they should smoke in the warehouse (R. 266).

The foregoing summarizes all of the testimony other than that of Respondent's officers,⁶ which bears upon the question whether or not the no-smoking rule was enforced. How can it be said that the rule was observed "very much in the breach thereof?" Krikorian testified that the men did not smoke in front of the Mosesians. Ekzoozian's testimony and Ejadian's testimony either do not bear on the issue of whether the employees were permitted to smoke or show that the employees did not smoke inside the warehouse. Even Machoian testified only with reluctance that the men smoked inside the warehouse "sometimes," and again with reluctance that he had smoked inside the warehouse in front of Mrs. Mosesian—and his testimony is said by the Trial Examiner not to be worthy of belief when contradicted by Krikorian's testimony.

The record actually shows that the only warehouseman who smoked in front of the Mosesians was Machoian. The only other warehouse employee who smoked inside the warehouse was Krikorian, who was only caught once and was thereupon reprimanded. W. H. Justice, the general operating manager, did smoke sometimes inside the warehouse. His pipes or cigars were unlit more often than lit and he was careful not to smoke between the stacks of goods. He assisted the Mosesians in preventing smoking among the men in the warehouse. The greater part of

⁶The testimony of Respondent's officers concerning the rule against smoking is concerned mainly with establishing the existence of "No Smoking" signs inside the warehouse and with reprimands to and the discharge of Machoian.

Mr. Justice's work was done in the warehouse office (R. 199) where Mrs. Mosesian herself would smoke (R. 189). There was testimony that Mrs. Mosesian had smoked in the warehouse. Louise Mosesian testified that her mother smoked only occasionally (R. 188) and that she never saw her smoke in the warehouse (R. 188). If Mrs. Mosesian did so, it was not often and in any event would not be relevant to the question whether or not the rule against smoking was enforced with respect to the employees.

When the foregoing testimony is considered as a whole, along with the uncontradicted testimony of Mary Mosesian that one Mirikian had been discharged for smoking shortly before Machoian came to work (R. 217), it is clear that Respondent's rule against smoking was known to the men and obeyed by them, except when they thought they could smoke without being observed. The statement that Respondent's rule was observed in the breach thereof finds no support in the record.

2. Machoian knew of Respondent's rule against smoking, was repeatedly reprimanded for his persistent violations, and was finally discharged because of his disregard of the rule.

The circumstances surrounding the hiring and discharge of Machoian have also been covered previously in the Summary of Facts. Three witnesses testified that Machoian was warned about smoking when he was hired (R. 165-167, 227, 269), as were the other employees when they were hired.

Louise Mosesian testified that she reprimanded Machoian for smoking because she feared that fire

would result and reported his smoking to Mrs. Mosesian (R. 192-196, 197-199). Machoian insisted that he was never reprimanded (R. 88). In this situation it is necessary to decide whom to believe of two interested witnesses: Machoian, who was impeached (R. 116) and whose testimony was contradicted by that of Ekzoozian (R. 227), his good friend (R. 226, 237, 241) or Louise Mosesian, whose testimony that she reprimanded Machoian for smoking and reported the incident to Mrs. Mosesian (R. 192-196) was never impeached or contradicted by anyone besides Machoian. Mrs. Mosesian also testified that she reprimanded Machoian for smoking (R. 269). Respondent submits that if Krikorian was reprimanded when he was caught smoking (R. 252), Machoian would according to common sense also have been reprimanded, and that the testimony of Louise Mosesian, Ekzoozian, and Mrs. Mosesian must be preferred to the reluctant testimony of Machoian, whom the Trial Examiner thought so untrustworthy.

With respect to Machoian's discharge, four witnesses testified that Mrs. Mosesian found Machoian smoking twice, once in the morning and once in the afternoon, on April 12, 1949, and that she reprimanded him; that she told her office girl, Violet Miskian, to have Machoian come into the office at the end of the day; and that when he did not do so she went out to the platform as he was leaving and told him he was discharged (R. 211-216, 218-219, 220-223, 228-232, 269-271). Mrs. Mosesian's testimony that the discharge was effected for smoking is corroborated

by Mary Mosesian (R. 212), Misikian (R. 221) and Ekzoozian (R. 228). Machoian testified merely that Mrs. Mosesian discharged him without explanation (R. 87, 104-107). Machoian testified that he thought "they fire me because I work for the Union," but that Mrs. Mosesian didn't tell him that (R. 107). Ekzoozian testified that Machoian told him that Mrs. Mosesian told Machoian not to come down to work anymore (R. 231-232).

The evidence that Machoian knew of no rule, was not reprimanded, and was suddenly discharged with no reason given is, then, merely Machoian's testimony—which the Trial Examiner chose not to believe when contradicted by that of Krikorian (R. 18). With respect to this issue again, this Court "cannot conscientiously find that the evidence supporting [the] decision is substantial, when viewed in the light that the record in its entirety furnishes." *Universal Camera Corp. v. N.L.R.B.*, supra.

It is not significant on this point that Louise, after the second box car incident, told Krikorian that Machoian was a good worker and that she would not fire him. (R. 261.) If as already pointed out this instance occurred around January 1, 1949, it has little to do with Machoian's discharge on April 12, 1949, since most of the reprimands for smoking must have occurred thereafter. If, on the other hand, the second box car incident took place some time in February, 1949, or thereafter, then Louise's statement that Machoian was a good worker would go far to show that at a time when Respondent was supposed to know

that Union activities were taking place and that Machoian was in them, Respondent did not intend to discharge Machoian, and therefore that Respondent must have changed its mind about Machoian later for reasons unrelated to his Union activities.

3. **A cumulative and contributing cause of the discharge by Respondent of Moses Machoian was his repeated singing and dancing in Respondent's warehouse during working hours.**

The facts with reference to this cause of Machoian's discharge have been well covered above in the Summary of Facts. Nevertheless, the relevant testimony will be here summarized in order to demonstrate that substantial evidence on the record considered as a whole does not show that this "belated attempt * * * is, if anything, less persuasive than its attempt to rely on the 'no smoking rule' " (p. 16 of the Board's brief) but on the contrary shows that the defense is complete and sufficient in itself.

Louise Mosesian testified that shortly after Machoian began working for Respondent she heard a voice singing very loudly in the Turkish language, that she went out into the warehouse and saw Machoian snapping his fingers and jumping around, and that she reprimanded Machoian (R. 167-169). She testified that Machoian sang and danced several times thereafter and that she reprimanded him (R. 169-170). She reported the incidents to Mrs. Mosesian (R. 169-170).

Machoian admitted that he sang in the warehouse, and in answer to the question, "How loud?" said "Well, not loud anyway" (R. 90).

Ekzoozian testified that Louise Mosesian talked to Machoian about his singing or dancing and that she said, "This is not a dancing room. You come down here for work, not for dancing" (R. 232).

Krikorian testified that he had seen Machoian sing or dance in the warehouse during working hours, although the singing had not bothered him and he would not be a judge of whether or not Machoian sang louder than he, Krikorian, sang; and also that Louise Mosesian had reprimanded him for such singing (R. 252, 258-259).

No other witness testified as to whether Machoian sang or danced at work. It is therefore clear, as the Board is compelled in its brief to admit (page 8), that Machoian did "wax exuberant at work," and it is clear that Machoian's "exuberance" provoked reprimands from his employer and that Mrs. Mosesian was made well aware of Machoian's misconduct.

The Board nevertheless says in its brief (page 8) that Machoian "was never disciplined or threatened with discharge for such conduct." The only citations given for this statement are to the Intermediate Report (R. 32-33) which, so far as we know, is not evidence in the case, and to Machoian's own testimony (R. 130-132). The citation to the Intermediate Report does not help the Board; the Trial Examiner himself found that Louise Mosesian did reprimand Machoian more than once for his "exuberance" (R. 32). The Board, in its brief, brushes aside this finding and evidently accepts Machoian's testimony, although it is

directly contradicted by that of his friend, Ekzoozian (R. 232), and although Machoian was an interested and unreliable witness. True, Machoian may never have been explicitly threatened with discharge for singing and dancing. What must be done in a very small business to "discipline" an employee? Surely the threat of discharge is implied in repeated reprimands, or would be to any person reasonably endowed with common sense.

The Board also claims (p. 8) that the latest occasion upon which Machoian's "exuberance" bothered Louise was several months before his discharge, but the testimony to which the Board refers (R. 167-169) in support of this proposition, shows that the first such occasion was in December, 1948 (R. 167); that "several times after that he bursted forth * * *" and that one such other occasion occurred around the first of the year (R. 169). How, on the basis of this testimony, or any other in the record, can any statement at all be made as to when was the latest occasion upon which Machoian's exuberance annoyed Louise?

The Board says that in any event this defense is irrelevant, since Louise had nothing to do with Machoian's discharge (p. 8). It is far from clear that she had nothing to do with Machoian's discharge. She reported these infractions of discipline to her mother (R. 170, 197-198) who eventually discharged Machoian.

Thus, respondent clearly established, upon evidence believed by the Trial Examiner, that Machoian sang

and danced at work and that Respondent objected to such conduct. The Board nevertheless says in its brief "Indeed, the very manner in which the defense is asserted further supports the Board's findings of discrimination. Inconsistency in explaining the reason for a discharge has long been regarded as a legitimate factor on which to base an inference that the true reason for the discharge is being concealed" (p. 16). Where is the inconsistency? Singing and dancing were pleaded as cumulative causes. Not every employee who is discharged for cause is discharged for one cause only or for an immediate cause only. Respondent is also unable to perceive why it should be accused of asserting the defense in such a manner as to support a finding of discrimination. Respondent amended its pleading in accordance with permission granted by the Trial Examiner (R. 116-117) after the Board's counsel first raised the issue (R. 90). Respondent protests against this accusation in the Board's brief, which finds no basis whatever in the record.

The foregoing discussion establishes the following facts with respect to the record in this case. First, the only conceivable affirmative evidence of discriminatory discharge is circumstantial evidence of anti-Union animus which was not connected in any way with Machoian's discharge since it was never shown that Respondent's officers believed that Machoian was a Union member, let alone a Union organizer. With respect to whether or not such an animus existed, it must be noted that the first box car incident, the oc-

casion on which Louise Mosesian made the statements to the men which supposedly demonstrated anti-Union animus, was placed by Krikorian as having occurred perhaps as early as January 15, 1949 (R. 253). It was also placed by both Krikorian (R. 255) and Machoian (R. 82) within a few days of the second box car incident, which as above shown (footnote 2, pp. 7-8) must have occurred early in January, 1949. Thereafter, Respondent told the men to vote as they pleased. (R. 123-124, 208, 233). Therefore, the so-called anti-Union animus was in all probability shown, if at all, three months before Machoian's discharge and shown by Louise Mosesian. The anti-Union animus was connected with Machoian's discharge by Mrs. Mosesian just as closely as, and no more closely than, Machoian's singing and dancing.

The second fact demonstrated by the record is that Respondent had a rule against smoking inside the warehouse of which all the employees were aware, which was enforced whenever infractions were noted, and which had resulted in the discharge of a previous employee. The third fact established is that Machoian violated this rule against smoking repeatedly, and the preponderance of the evidence shows that he was reprimanded for his violations repeatedly, that Mrs. Mosesian was made aware of them, and that she assigned them as the reason for Machoian's discharge. The fourth fact established is that Machoian indulged in other misconduct during working hours for which he was reprimanded and of which Mrs. Mosesian knew.

Respondent does not contest the argument that where an employee believed to be responsible for organizing is discharged in a setting of Union hostility, an inference is justified that the discharge was discriminatory. Respondent agrees that such an inference may be "inescapable where it also appears that the discharge was precipitate without prior reprimand, warning or discipline" (Board's brief p. 14). However, these principles of law simply have no application to this case. In this case there is no evidence that Respondent believed Machoian to be responsible for organizing the plant or even that Respondent knew Machoian was a Union member. And, in this case the discharge was not precipitate without prior reprimand. It is also said that refusal to give the employee any reason for his discharge shows that the motive may have been discriminatory. However, in this record there is only Machoian's own testimony and the testimony of his friend Ekzoozian as to what Machoian told him concerning Mrs. Mosesian's statements to show that no reason was assigned, and this testimony is contradicted by that of Mrs. Mosesian.

A close parallel to the present case on the discriminatory discharge issue is *Pittsburgh Steamship Co. v. N.L.R.B.*, 180 F. (2d) 731 (C.A. 5th, 1950), affirmed 71 S. Ct. 453 (1951). In this case it was contended that the company had discriminatorily discharged a union organizer. The company contended that the organizer, Shartle, was discharged for incompetency. The employer offered testimony of its supervisors, who were licensed officers on one of its Great Lakes merchant vessels, that Shartle was un-

familiar with some of his work, that he was careless and that sometimes he returned to his ship late without explanation. Specifically, evidence was offered that Shartle was supposed to handle a winch which could injure men if not carefully tended. There was testimony that Shartle had, on an occasion, operated the winch negligently. Although no one had ever been discharged for so doing, there was uncontradicted testimony that another man had been demoted for such negligence with loss of pay. Shartle denied that he had been negligent. One of the ship's officers testified that Shartle was lazy, that his partner would do three-fourths of the work and that he reprimanded Shartle. Shartle was discharged by the first officer of the ship, who had the exclusive power to discharge men. The Examiner held that the incompetence shown was unsubstantial. The Examiner found that the isolated mistakes in the operation of the winch and Shartle's unfamiliarity with the technique in rarely required work did reflect a certain lack of experience and skill and that it might be assumed that Shartle fell short in other respects of the degree of skill possessed by old line seamen. The Examiner concluded that Shartle was discharged for Union activity, inasmuch as the incompetence shown was unsubstantial. The Examiner questioned the discharge also on the grounds that the first mate had not consulted the other mate, although the First Mate had asked the Third Mate shortly before the discharge how Shartle had been getting along with his work. No one else involved in the *Pittsburgh Steamship* case claimed to

have been prevented from engaging in Union activities. The Court said: "Reading the case in the light of the whole record, we conclude that Shartle was discharged for cause, and that the finding that he was discharged because of Union activity is not supported by reliable, substantial and probative evidence." 180 F. (2d) 741. The decision of the Court in the *Pittsburgh Steamship* case is squarely applicable to this case. In this case as in that only sporadic occurrences furnish any basis for finding that Respondent had an anti-Union animus. In this case as in that the Examiner and Board relied upon supposed weaknesses in the defense as affirmative evidence of discriminatory discharge.

On the record and on the authority of the *Pittsburgh Steamship* case, supra, it must be held that Respondent discharged Moses Machoian for cause and that the Board's order that Machoian be given back pay should not be enforced.

II. THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD CONSIDERED AS A WHOLE TO SHOW THAT RESPONDENT ENGAGED IN INTERFERENCE, RESTRAINT OR COERCION, BUT ON THE CONTRARY THE RECORD SHOWS THAT RESPONDENT INFORMED ITS EMPLOYEES THAT THEY COULD VOTE IN THE REPRESENTATION ELECTION AS THEY PLEASED.

The Board found interference, restraint and coercion in "the coercive statements and conduct of Louise Mosesian and Twodi Mosesian, involving interrogation into Union activities and threats to close the

warehouse, as set forth in the Intermediate Report'' (R. 66).

The Intermediate Report found interference, restraint and coercion, as follows (R. 25):

Louise Mosesian's inquiries in the box car as to the employees' union membership, her statement that she already knew who had signed and her threat, in the face of their denials, to obtain the information elsewhere; her statement or threat on the same occasion that her mother could always shut down the warehouse or rent it out.

Louise Mosesian's statement to Krikorian relative to his voting against the Union in the election, and her inquiry of him as to how Ejadian would vote.

Mrs. Mosesian's message to Ejadian, delivered through Azidigian, that if the warehouse became Union, she would release those [union] workers and get other.

Three alleged incidents furnish the basis for the above-quoted conclusions. Each of these has already been mentioned in the Summary of Facts in this Brief, but the testimony concerning the incidents will here be reviewed in detail in order to demonstrate the shaky foundation for the conclusion of the Trial Examiner and Board.

The first such incident occurred on a date uncertainly fixed by Machoian as being about the middle of February (R. 77, 78, 79, 110) and by Krikorian as being between January 15th and the first of March (R. 253) and a few days before or after the second

box car incident (R. 255). According to the testimony of Krikorian, Louise Mosesian came into a box car in which all the men were working and asked if any of the boys had spoken to anybody. To this the employees answered, No. Then she asked, whether any of them had joined the Union, and each said, No. She said that she knew who had signed but they didn't have to tell her, she would find out anyway. She then asked Ekzoozian whether Mama had always kept four or five men working in the warehouse, even in tough times, and Harry said, Yes. Krikorian then testified as follows:

“And then she said something about ‘Mama could always shut it, the warehouse.’ and I don’t know how that came about, because I haven’t asked.”

Q. You say “because you haven’t asked.”

A. Because I have been through it already.

Q. What do you mean?

A. With Mr. Bamford.

Krikorian testified that nothing else was said at that time. (R. 253-254, 259). This incident, according to Krikorian, took ten minutes.

Machoian's testimony as to this incident was similar (R. 77-80). He testified, in addition, that Louise said, “If you fellows vote for the Union, well, you know what is going to happen. We don’t want Unions in this.” Employee Ekzoozian testified that the only time Louise ever came into the box cars she merely told the men to hurry in their work (R. 234-235). Ejadian did not testify with respect to the incident.

Louise Mosesian denied that it had occurred (R. 170-174).

The Trial Examiner found that the incident occurred substantially as testified to by Krikorian, shortly after February 10, 1949 (R. 19-20). Since the second box car incident occurred about January 1, 1949, this incident must actually have occurred very early in January, 1949. The Trial Examiner in fixing the date of the first box car incident must have relied on Machoian's testimony (R. 77) suggesting that the Mosesians had just prior to the incident received a letter from the Union. But Krikorian testified (R. 255) that on this occasion Louise did not mention any letter from the Board. According to the Trial Examiner (R. 18), Machoian's testimony should be disregarded; since Respondent never received a letter from the Union (R. 17, 19), but only from the Board, Machoian must have referred to the Board's letter.

Louise's remarks on this occasion boil down to the following:

(a) She asked the men which were Union members;

(b) She asked Ekzoozian if Mrs. Mosesian had not always kept men on in the warehouse; and

(c) She may have said something to the effect that Mrs. Mosesian had, during these tough times, been able to shut the warehouse or rent it out or that she could do so, it being evident that Krikorian was confused as to this last statement by Louise Mosesian.

The second alleged incident was testified to only by Krikorian. According to him, he met Louise Mosesian in the warehouse some time before the election, and she said, "I know you will vote against the Union, but how about Eddie?" (R. 261).

These are the only incidents which are clearly placed as having occurred prior to the election. This evidence at most sustains a conclusion that Respondent wished to discover whether or not there was sufficient interest in the men in a Union to justify an election, or whether Respondent should at once recognize the Union without holding an election. Louise also may have made an appeal, not couched in any threatening terms, to the men to consider whether their working conditions had not always been good previously. More than this cannot be extracted from this testimony as to one brief incident which occurred at least one month and probably two months before the election and two or three months before Machoian's discharge. On the election date, or one day previously, the men were told they were to vote just as they pleased (R. 208, 233).

The other incident relied on is a message which Mrs. Mosesian is supposed to have sent to employee Ejadian. Ejadian's mother-in-law, Agnes Azidigian, worked as housekeeper for Mrs. Mosesian. Ejadian testified that his mother-in-law told him that Mrs. Mosesian had said to Mrs. Azidigian that if he ever joined the union, she would fire him (R. 155). He first said this occurred after the election, then that it occurred before the election. In an effort to improve

Ejadian's testimony on this point, General Counsel showed Ejadian a paper written by one Mrs. Phoenix (R. 158). He was asked if the paper helped refresh his recollection as to what his mother-in-law told him. Ejadian answered, "I think so now, because it has been so long I forget" (R. 158). He later testified, when again asked about the contents of the message Mrs. Mosesian was supposed to have given his mother-in-law, as follows (R. 159-160):

A. She told my mother-in-law if I joined the Union she was going to——

Trial Examiner Downing: She was going to what?

The Witness: You got me puzzled.

Q. (By Mr. Siciliano): Well can you remember? What did she tell you?

A. I think she said if we joined the Union, she was going to get better men.

Q. She said nothing else?

A. That is all she told me.

Q. Is that what you said yesterday, Eddie?

A. I don't remember, maybe I did, maybe I didn't.

Q. But you remember what you said yesterday?

Trial Examiner Downing: He has already testified to that.

Mr. Siciliano: Mr. Examiner, we are just trying——

Trial Examiner Downing: He was asked on Cross-Examination if he remembered what he said yesterday, and he said "No."

It is at once apparent that little can be made of this testimony. Ejadian could not remember from one

day to the next what he had testified to (R. 160), nor could he remember the statement which Mrs. Phoenix had prepared for him.

Mrs. Azidigian was also called as a witness. She testified that Mrs. Mosesian one day told her that "If Eddie belonged to Union, she don't keep him—like these workers, better workers" (R. 180). She testified that she told Ejadian about this, not the same day, but, "Later. Pretty late I told him" (R. 181). She could not remember how much later. She fixed the date of her conversation with Mrs. Mosesian as having taken place in May or June of 1949 (R. 183) and she testified that Mrs. Mosesian did not say that if Eddie joined the Union he would lose his job (R. 184).

Thus, Respondent is held to have committed unfair labor practices on the basis of contradictory and obscure testimony concerning three isolated brief incidents which occurred many months apart in time. Respondent's officers denied making the statements involved, but the Trial Examiner and the Board preferred to believe the testimony of others. This contradicted testimony, when considered along with the uncontradicted testimony that the men were told that they could vote as they pleased—this testimony, which even if believed, does not show an intent to fire anyone for Union membership or to discourage Union membership—is far from establishing interference, restraint or coercion. Nor does it establish the "anti-Union animus" relied on to show that Respondent discriminatorily discharged Machoian. And the state-

ments of Louise Mosesian, if made at all, must have been made around January 15, 1949. When Respondent learned an election would be necessary Respondent permitted it to take place without opposition and explicitly instructed the employees to vote as they pleased. How can it honestly be said that Respondent interfered with, coerced and restrained its employees? How can it be said that these isolated incidents demonstrate Respondent's determination to prevent organization and thereby support a finding that Machoian was discriminatorily discharged?

On page 11 of its Brief, the Board cites cases as authorities that Respondent violated Section 8(a)(1) when Louise Mosesian asked the warehouse workers whether or not they were Union members. On page 12 the Board cites cases as authority that Louise's "thinly veiled threat"—which was ambiguous at best and which may never have been made—constituted interference, restraint and coercion. It is true that something of the sort occurred in each of these cases—along with many other acts. In *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514, 61 S.Ct. 320 (1941), the company's superintendent and various foremen reprimanded employees for attending union meetings, threatened one with discharge if he joined the union, called employee meetings at which they spoke disparagingly of the union, campaigned for a company union, and questioned employees concerning their labor union sympathies. In *N.L.R.B. v. Bradford Dyeing Association*, 310 U.S. 318, 60 S.Ct. 918 (1940), there were discriminatory discharges proved on inde-

pendent evidence and efforts to set up a company union in addition to the questioning. In *N.L.R.B. v. Holtville Ice & Cold Storage Company*, 148 F. (2d) 168 (C.C.A. 9th, 1945), there was an effort by the employer to have an independent investigation of union activity, there was urging of several employees to back out of the union, there were statements that unions would not be permitted in the area, there were proposals to form an independent union, plus a refusal to bargain with men who stated that they were duly elected representatives of the employees. In *N.L.R.B. v. J. G. Boswell Co.*, 136 F. (2d) 585 (C.C.A. 9th, 1943), there were statements that the employer would never tolerate or recognize the Union, advice that employees should seek employment elsewhere if they wished to join a Union, warnings that Union members would not be reemployed at the termination of approaching seasonal lay-off periods, threats to lock up the plant, and refusal to permit the posting of a notice that the company would not discriminate against employees who wished to join a Union. Each of the other cases cited by the Board involved a whole series of different acts establishing with certainty that the employer gave the men to understand that they would lose their jobs if they joined or worked for the Union. In these cases the questioning was one of many elements and the threat to shut down was explicit and accompanied by other acts. In some it was not even contended that no unfair labor practices had been committed, *N.L.R.B. v. Long Lake Lumber Co.*, 138 F. (2d) 363 (C.C.A. 9th, 1943);

N.L.R.B. v. Fruehauf Trailer Co., 301 U.S. 49, 57 S.Ct. 642 (1937). Thus, these cases are no authority at all that Louise Mosesian's alleged questions or statements constituted coercion or restraint. Nowhere can a case be found in which it is held that the employer was guilty of interference, restraint or coercion on the basis of three isolated incidents which may not have occurred at all, which involved no statement that any individual would be discharged if the employees joined the Union, and which involved no statement that if the men joined the Union the plant would be shut down.

III. RESPONDENT DID NOT RECEIVE A FAIR HEARING BECAUSE OF THE BIAS OF THE TRIAL EXAMINER AND OF THE BOARD, AS CLEARLY SHOWN BY THE DISTORTIONS OF EVIDENCE RELIED ON TO SUSTAIN THEIR CONCLUSIONS AND FINDINGS AND BY THEIR CONSISTENT DISBELIEF OF RESPONDENT'S OFFICERS ON CRITICAL ISSUES.

A. THE INTERMEDIATE REPORT AND RECOMMENDED ORDER EXHIBITS BIAS.

The Intermediate Report is replete with indications of the Trial Examiner's bias. This bias is shown in two ways: first, in the choice by the Trial Examiner of which witnesses he chose to believe, and second, in his distortions of the testimony he did believe. Those parts of the Intermediate Report which demonstrate his bias will be covered here in the order of their appearance in the Report.

(1) The Trial Examiner found that about February 10, 1949, Louise Mosesian came into a box car and

made the statements already referred to concerning whether or not Mrs. Mosesian had not always kept four or five men working in the warehouse, and that she could always shut it or rent it out (R. 19-20). The Trial Examiner based this finding upon the testimony of Krikorian and Machoian (R. 77-80, 114-116, 252-255, 259). He disregarded the testimony of Louise Mosesian, that the statements were never made (R. 171-175). True, as an officer of Respondent, she was interested in the outcome of the case but the witnesses who were believed are also interested. Krikorian, as the record shows, was actually the leader in Union organization; Machoian has a pecuniary interest in the outcome of this case, and further was impeached (R. 116). Louise Mosesian's testimony was corroborated by that of Ekzoozian (R. 234-236, 240-242). The Trial Examiner states (R. 18-19) that in reconciling the testimony he made a due appraisal of the "social relationship existing between Ekzoozian and the Mose-sians." He was evidently unwilling, however, to make a due appraisal of the social relationship between Ekzoozian and Machoian (R. 226, 237, 241).

(2) The Trial Examiner believed Krikorian's testimony (R. 22) that Krikorian asked Louise Mosesian if she were going to fire Machoian and that she replied "No, he is a good worker." He refused to believe Louise Mosesian's denial that she had ever discussed Machoian with Krikorian. It is not the duty of the hearing officer in resolving conflicts in testimony always to believe the testimony of witnesses favorable

to one side, and to discredit the testimony favorable to the other side.

(3) The Trial Examiner (R. 22) found that Sohigian's "admission" established that Sohigian and the Mosesians had discussed Machoian and his Union activities before the election. But the truth of the matter is that the record shows that Sohigian testified in substance that such discussions could have taken place any time between the end of 1948 and the date of the hearing (R. 148-152). Why should the Trial Examiner make untrue statements in his Intermediate Report concerning the effect of testimony unless he was determined to decide the case against Respondent and was simply attempting to find some ostensible support for his holding?

(4) With respect to Louise Mosesian's alleged questioning of Krikorian as to how Ejadian would vote in the election, the Trial Examiner again chooses (R. 23) to believe the interested witness (Krikorian) whose testimony might support the finding of an unfair labor practice and to disbelieve Respondent's officer (Louise Mosesian), whose testimony goes the other way.

(5) Another indication of bias appears with respect to the Trial Examiner's conclusions concerning the alleged message from Mrs. Mosesian to Ejadian (R. 23). First, again, he chooses to disbelieve the testimony of Respondent's officer, Mrs. Mosesian (R. 272) that no such message was given, and to believe the confused testimony (R. 155-161, 179-184) which supports

the result he desires to reach. Second, he says (R. 23) that "Mrs. Azidigian became quite confused as to the time of the occurrence of the incident, but Ejadian's testimony fixes it definitely as having occurred before the election." How can the Examiner in good conscience make such a statement in his report concerning the evidence? Mrs. Azidigian said she was "pretty sure" that the incident occurred in May or June of 1949 and she fixed it by a date which she would be certain to remember—the graduation of her boy from high school (R. 183). Mrs. Azidigian was not "quite confused." She knew just when the incident occurred. Ejadian testified (R. 155) that the incident occurred before the election and that it occurred after the election. Evidently he was the confused witness, especially in view of his later testimony (R. 160) that he could not remember what he had testified to the day before when he was attempting to place the incident in time.

(6) The Intermediate Report also shows bias in its treatment of the events surrounding Machoian's discharge on April 12, 1949 (R. 25-26, 29-30). The Trial Examiner states that Ekzoozian's testimony (R. 228-232) corroborating that of Mrs. Mosesian with respect to her having caught Machoian smoking twice on that date was "extremely confused and contradictory as to details." On the contrary, however, his testimony was clear as to details. He testified that on that date Machoian smoked once in the morning and once in the afternoon, and that Mrs. Mosesian caught him each time (R. 228-230). Further, in discussing this inci-

dent the Trial Examiner blandly omits to refer to the corroborating testimony of employee Violet Misikian (R. 220-223), of Mary Mosesian (R. 217-219) and of Mrs. Mosesian (R. 269-271). The Trial Examiner merely says (R. 30) that he does not credit Mrs. Mosesian's testimony that she caught Machoian smoking twice on the day of the discharge.

The Trial Examiner finds (R. 29) that Mrs. Mosesian did not assign any reason for Machoian's discharge by believing Machoian's testimony (R. 87) and disbelieving Mrs. Mosesian's (R. 271). The Trial Examiner claimed (R. 30) that Machoian's testimony in this respect was corroborated by that of Ekzoozian and Violet Misikian. But Ekzoozian testified merely that Machoian had said to him that Mrs. Mosesian said "don't come down to work tomorrow" (R. 231-232). Ekzoozian did not know then what Mrs. Mosesian said—he merely knew what Machoian told him and Violet Misikian testified that she did not know what Mrs. Mosesian said to Machoian (R. 222).

(7) The discussion of the Trial Examiner (R. 26-29) concerning Respondent's rule against smoking contains shocking examples of distortion of the record and of reliance upon matters not in evidence. First, no testimony of W. H. Justice showed that Mrs. Mosesian's cautions against smoking "were generally understood to apply only to portions of the warehouse where the more inflammable materials were stored" (R. 27). Justice testified simply that he cautioned the regular warehousemen not to smoke in the ware-

house, that he smoked in the warehouse occasionally himself, although not between the stacks, and that his pipe or cigar were more often unlit than lit (R. 264-265). What bearing can this testimony possibly have on the content of Mrs. Mosesian's instructions to the employees concerning smoking? Next, the Examiner says (R. 271) Respondent's stencilled "No Smoking" signs were small, approximately one inch high and of "ancient origin," despite his own statement (R. 196) that he visited the warehouse and saw "No Smoking" signs stencilled on the pillars of the warehouse which "were visible to anyone." Why this innuendo?

The next example of his bias is the Trial Examiner's statement (R. 27) that Louise had been "unable to recall when interviewed by a field examiner several months before the hearing whether they [the signs] were actually on the pillars at the time of the interview or during the period of Machoian's employment." The record contains no support whatever for this statement.

The Trial Examiner next stated (R. 28) that the testimony of Respondent that cardboard "no smoking" signs were put up during Machoian's employment but were defaced or torn down from time to time was contradicted by the testimony of Ejadian. But in fact, Ejadian was confronted with a prior statement in which he had said that "for the first time there were about five or six paper signs in the warehouse, saying, 'No Smoking'" (R. 248), with respect to which statement he said, "I just remember that I had

signed it” and that that was all that he remembered about it (R. 250-251). Ejadian’s testimony clearly amounted not to a contradiction but to a zero. And, Justice and Krikorian did not contradict testimony of Respondent’s witnesses concerning the cardboard signs, inasmuch as they were never asked about them.

The Trial Examiner also states that “occasional cautions or reprimands from the Mosesians were shrugged off and openly disobeyed” (R. 28). We have already covered this ground thoroughly in this brief. Examination of the record shows that only Machoian “shrugged off and openly disobeyed” Respondent’s rule against smoking and that Machoian was discharged because he did so.

The Trial Examiner then discusses W. H. Justice. He says (R. 28) that “Justice frankly admitted smoking in the warehouse and customarily went about with a pipe or cigar in his mouth before the other employees,” and that the testimony of the Mosesians and Ekzoozian that Justice’s pipe and cigar were unlit is “not credited in view of Justice’s own testimony to the contrary.” As has always been pointed out in this brief, Justice testified that his cigar and pipe were more often unlit than lit and that he did not smoke between the stacks (R. 264-265). Justice did most of his work in the warehouse office (R. 199). When he went out into the warehouse with his pipe he would carry his hand over the bowl (R. 264-266). Why the use of the phrase, “frankly admitted” or the word “customarily”? Why the suppression of the fact that the pipe or cigar usually was unlit?

The Trial Examiner next states (R. 29) that Krikorian testified that he and the other employees "customarily" smoked in the warehouse. This is a distortion of Krikorian's testimony (R. 262) that the men smoked behind the Mosesians' back and that he did not smoke in front of Mrs. Mosesian if he could help it (R. 252).

Finally, bias is also shown concerning Respondent's no smoking rule in the Trial Examiner's refusal (R. 31) to credit Mary Mosesian's testimony that an employee had been discharged for smoking. He says that the testimony is not corroborated by any witness, and implies that for this reason it is not credited. This is the first time that Respondent has encountered the rule of evidence which says that the uncontradicted testimony of an unimpeached witness is to be or may be disregarded unless corroborated by another witness.

So with respect to Respondent's rule against smoking, the Trial Examiner sought to show its non-existence by disregard of the record and by misstatements of testimony therein contained.

(8) The Trial Examiner next shows his bias by saying that "the belated pleading at the hearing of additional reasons for the discharge also cast (sic) a dubious shadow upon the bona fides of Respondent's original defense," (R. 32). He seems to think that the time at which a defense is pleaded—pleaded with his own permission (R. 116)—is evidence in the case. If so, this evidence was put in not under oath and without an opportunity of cross-examination, and

should have been disregarded just as hearsay is disregarded. Respondent never objected to this "evidence," but Respondent was never made aware that such "evidence" was in the record.

(9) The next indication of bias in the Intermediate Report is the Examiner's discussion of the purported affirmative evidence in the record that Machoian was discharged because of Union membership and activities (R. 35). He says "Machoian took the lead in the discussions and concerted activities which led to the formation of the Union." The record is opposed in this conclusion (R. 119-121, 153), which even the Board had to reject. With respect to the question whether or not Respondent's officers believed that Machoian was the Union leader, the Examiner said, "Despite the denials by the Mosesians, the record discloses that they were well aware of the part Machoian was playing" (R. 35). He says that this conclusion is established by the testimony of Sohigian that he had discussed Machoian's activities with the Mosesians at their home and by Ekzoozian's later accusation of Machoian as the Union organizer, Ekzoozian's threat to have Machoian fired, and Ekzoozian's departure for the office to carry out his threat (R. 35). We have already covered this ground. Suffice it to repeat that Sohigian's testimony was that he discussed Machoian's Union activities—and he does not say where such activities that were discussed occurred or what was their nature—sometime before the date of the hearing and after the end of 1948 (R. 151). There was irrelevant testimony that Ekzoozian threatened

to have Machoian fired and that after making this threat he departed for Respondent's office (R. 83-84, 260-261). There is no testimony as to why he went to the office, or that he ever said anything to the Mosesians about the incident. In fact, Krikorian's testimony, as already pointed out, indicates either that he said nothing or that if he did, the Mosesians did not care (R. 261). The Trial Examiner recites this distorted version of Ekzoozian's alleged act in order to lend some color to his assertion that there is affirmative evidence in the record of discriminatory discharge. He then says "that Respondent did not immediately effectuate Ekzoozian's threat does not detract from the conclusion herein reached." Here is a statement filled with innuendo! There is no evidence that the threat was ever communicated to Respondent, and Ekzoozian was a mere employee, without any power whatever to hire or fire or to recommend hiring or firing (R. 207).

The foregoing examples demonstrate that the Intermediate Report is not a judicial opinion but is a brief of a party to a litigation.

True, the Trial Examiner found for Respondent on the issue of Ejadian's discharge (R. 23-24) from extra work. In order to do so he credited testimony of Louise Mosesian (R. 178-179)—the witness whom he refused to believe on so many other issues. What is more surprising, he held evidently that this testimony outweighed the testimony of Mrs. Azidigian (R. 179-184) and of Ejadian (R. 154-160) concerning the mes-

sage from Mrs. Mosesian to Ejadian. This testimony thus established that Respondent indulged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act (R. 25), but the evidence was not given weight with respect to a contention of a violation of Section 8(a)(3). Why? It has already been demonstrated that the Examiner was guilty of bias. Perhaps he wished to throw suspicion off the track by holding for Respondent on one minor issue. No other plausible explanation is available.

Pittsburgh Steamship Co. v. N.L.R.B., 167 F. (2d) 126 (C.C.A. 6th, 1948), is directly applicable to this case on the issue of bias. In that case the court observed that "every witness who testified for the Union was found to be reliable and truthful, and all who were called by the Petitioner, evasive and unreliable." 167 F. (2d) 128. The court said, "Courts have recognized that it is contrary to human experience that all witnesses on one side of a case are falsifiers, while those on the other side are all truthful, and this conclusion must be obvious to anyone with even a minimum experience as a trier of facts." 167 F. (2d) 129. The court, therefore, denied enforcement of the Board's order because of the Trial Examiner's bias. The same result must follow in this case.

B. THE DECISION AND ORDER OF THE BOARD EXHIBITS BIAS.

The Board said that it had considered the Intermediate Report, Respondent's exception to brief and the entire record in the case, and "hereby adopts the findings, conclusions and recommendations of the

Trial Examiner," with certain additions and modifications (R. 65-66). It did so in the teeth of Respondent's exceptions (R. 45-63) which plainly called to the Board's attention the bias of the Trial Examiner.

The Board indulges in a misstatement of the effect of the record. It says, "Moreover, the credited testimony of Krikorian and Sohigian established that the Respondent's officials believed that Machoian was responsible for bringing the Union into the warehouse" (R. 66). Certainly the Board had to establish belief in Respondent that Machoian was at least in the Union, but as we have already pointed out Krikorian's testimony merely shows that Ekzoozian and Machoian once argued about Mr. Sohigian, and Mr. Sohigian's testimony only establishes that at some unknown date and occasion Sohigian and the Mosesians talked about Machoian.

The Board then, like the Trial Examiner, proceeded to say that Respondent's no smoking rule, if it existed, was rarely enforced (R. 67). That the rule was always enforced we have repeatedly pointed out in this brief and we shall not weary the court with further references to the record. The lack of foundation in the record for the Board's Decision and Order demonstrates that the Board was biased against Respondent.

This case then must be governed by *Pittsburgh Steamship Co. v. N.L.R.B.*, 167 F. (2d) 126 (C.C.A. 6th, 1948), and enforcement be refused by reason of the fact that Respondent has not had a fair hearing.

IV. PARAGRAPH 1(a) AND (b) AND PARAGRAPH 2(c) OF THE ORDER OF THE BOARD SHOULD NOT BE ENFORCED BECAUSE THE POLICIES OF THE ACT WILL NOT BE EFFECTUATED BY SUCH ENFORCEMENT.

A. THERE IS NO EVIDENCE TO SUPPORT THE TRIAL EXAMINER'S DETERMINATION THAT THERE EXISTS DANGER THAT THE ALLEGED VIOLATIONS OF SECTION 8(a)(1) AND (3) OF THE ACT WILL BE CONTINUED IN THE FUTURE, AND THE BOARD DID NOT FIND THAT THERE IS SUCH DANGER.

The Trial Examiner held that danger of the commission of future unfair labor practices "is to be anticipated from the Respondent's conduct in the past" (R. 38). The Board made no finding with respect to the existence of such danger.

It has already been shown herein that Respondent has committed no unfair labor practices. In any event, the isolated incidents involved in this case, which occurred two years and more ago, are not enough to show that there is danger of commission of similar acts in the future. In *Virginia Electric & Power Co. v. N.L.R.B.*, 115 F. 2d 414 (C.C.A. 4th, 1940), it was held that interrogation of employees by superintendents constituted interference, restraint and coercion. The court found that other unfair labor practices had not occurred as charged and that the questioning constituted the sole unfair labor practice in the case. The court said, "Cease and desist provisions * * * ought not to be enforced because of an incidental finding as to an unfair labor practice of minor character which has long since ceased to be operative or to have any effect. A court of equity will not grant an injunction to restrain one from doing 'what he is not attempting and does not intend to do'

Blease v. Safety Transit Co., 4 Cir., 50 F. (2d) 852, 856." See also *E. I. Dupont de Nemours & Co. v. N.L.R.B.*, 116 F. (2d) 388 (C.C.A. 4th, 1940). Where only minor unfair labor practices of doubtful authenticity are shown, which occurred long ago, if at all, and where there is uncontradicted evidence that the employer went out of its way to assure employees that they might vote as they wished in the representation election, no danger of continuation of unfair labor practices is demonstrated and no need for a cease and desist order is shown.

B. THE BOARD'S ORDER IS IMPROPER BECAUSE IT IS NOT IN COMPLIANCE WITH THE ADMINISTRATIVE PROCEDURE ACT AND THE NATIONAL LABOR RELATIONS ACT.

Section 8(b) of the Administrative Procedure Act, insofar as it is relevant, provides as follows:

"Submittals and Decisions.—Prior to each * * * decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions * * * exceptions to the decisions or recommended decisions of subordinate officers * * * The record shall show the ruling upon each exception presented. All decisions * * * shall * * * include a statement of (1) findings and conclusions, as well as the reason or basis therefor * * *"

Section 10 (c) of the National Labor Relations Act provides as follows:

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in

or is engaging in any such unfair labor practice, then the Board shall state its findings of fact
* * *

Plainly the Board did not comply with these requirements of law. First, this record does not show the rulings of the Board upon each exception presented by Respondent. It is not apparent that Respondent has been "fully apprised * * * of the Board's ruling upon the exceptions" (p. 19 of the Board's brief). Respondent does not know whether all of them were rejected, or whether some were accepted and some rejected, or whether the Board felt that all the exceptions were well taken but that they nevertheless did not establish error on the part of the Trial Examiner. The quotation in the Board's brief from the committee reports⁷ on the Administrative Procedure Act does not bear upon the question whether or not the Board complied with the requirements of the law concerning ruling upon exceptions. The Administrative Procedure Act included this provision concerning exceptions in order that administrative agencies might be compelled, for the sake of the record, to examine into charges of error or bias just such as those which were made in this case. Had the Board reviewed Respondent's exceptions, this long Brief in a simple evidence case would not have been necessary. Instead, had an appeal taken place at all, only the disposition of certain specific exceptions need have been discussed.

⁷Senate Committee Report 752, 79th Cong., 1st Sess., p. 24; House Report 1980, 79th Cong., 1st Sess., p. 39.

Second, the Board did not state its findings of fact, as required by Section 10 (c) of the National Labor Relations Act and by Section 8 (b) of the Administrative Procedure Act. The Board in this case issued a "Decision and Order," which says that the Board agrees with some things the Trial Examiner said and that it disagrees with other things he said. Respondent can only assume that the Board's findings of fact are contained somewhere on pages 66 and 67 of the record, since they are nowhere plainly or separately stated.

Third, the Board's decision did not include any statement of the reasons or bases for its findings and conclusions, as required by Section 8 (b) of the Administrative Procedure Act. The congressional committees reported as follows concerning this requirement:

The requirement that the agency must state the basis for its findings and conclusions means that such findings and conclusions must be sufficiently related to the record as to advise the parties of their record basis. (Senate Report 752, 79th Cong., 1st Sess., p. 24; House Report 1980, 79th Cong., 1st Sess., p. 39).

Failure of the Board to meet this requirement is most obvious in the discussion (R. 67) of Respondent's no smoking rule. The result is that Respondent has been compelled to take the time of the Court to point out what the reasons or bases of the findings must have been and to show that such reasons or bases are insufficient. The noncompliance of the

Board with this requirement of law is too obvious to require further comment.

Denial of enforcement of the Board's order in this case will serve a much-needed warning upon the Board that it is to comply with the law in preparing its decisions.

CONCLUSION.

It is respectfully submitted to this Court that the record shows that there is no substantial evidence, when the record is considered as a whole, that Respondent has ever committed an unfair labor practice. It is submitted that Respondent did not discriminately discharge Moses Machoian and that Respondent never committed any act which constituted interference, restraint and coercion of its employees with respect to the rights guaranteed by Section 7 of the Act. It is submitted that the Board and its Trial Examiner did not grant Respondent a fair hearing. Finally, it is submitted that the Decision and Order of the Board is improper and invalid in that it is unnecessary and is not in compliance with Section 8 (b) of the Administrative Procedure Act or with Section 10 (c) of the National Labor Relations Act.

Dated, Fresno, California,
May 28, 1951.

Respectfully submitted,
HOWARD B. THOMAS,
Attorney for Respondent.

Appendix.

Appendix

The relevant provisions of the National Labor Relations Act, as amended by Section 101 of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. Sec. 141 *et seq.*) are as follows:

“RIGHTS OF EMPLOYEES.

“SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. * * *

“UNFAIR LABOR PRACTICES.

“SEC. 8. (a) It shall be an unfair labor practice for an employer—

“(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; * * *

“(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

“SEC. 8. (c) The expressing of any views, argument, or opinion, of the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat or reprisal or force or promise of benefit.

“PREVENTION OF UNFAIR LABOR PRACTICES.

“SEC. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *

“SEC. 10 (e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth

in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

The relevant provision of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001 *et seq.*, is as follows:

“SEC. 8. (b) SUBMITTALS AND DECISIONS.

“* * * The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.”

No. 12819

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CELSO HERNANDEZ ARZAGA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

Jurisdictional Statement.

Jurisdiction of the matter appealed from herein lay in the United States District Court, for the Southern District of California, Southern Division, under Section 2255 of Title 28, United States Code. The cause having been tried in that Court originally, a motion was made in that Court and filed August 31, 1950, for correction of Judgment and sentence under Section 2255 of Title 28, United States Code [R. 11 to 13, incl.]. Said Motion to Correct Judgment and Sentence was denied by Honorable Ben Harrison, District Judge on September 11, 1950 [R. 15]. A Notice of Appeal from said denial was filed December 27, 1950, based upon authority of the same Section 2255 of Title 28, United States Code [R. 19 to 21, incl.].

The District Court had jurisdiction to try the case under 18 U. S. C. (new) Section 3231. The United States Court of Appeals has jurisdiction over appeals from all final decisions of the District Court, except where direct review is authorized by statute to the Supreme Court and the authority is 28 U. S. C. Sec. 1291.

Statement of the Case.

FACTS.

The appellant was indicted by the Federal Grand Jury for the Southern District of California, August 4, 1948, July, 1948, term, in two counts, charging first the importation from Mexico into the United States of one five-*tael* can of prepared smoking opium, a narcotic drug, contrary to law and in violation of Section 174, Title 21, United States Code; second, the receiving, transportation, and concealment, after importation, of said narcotic drug, the five-*tael* can of prepared smoking opium, which had been imported into the United States from Mexico, as the defendant well knew, and contrary to law, in violation of the same section and title of the United States Code [R. 2-3].

Appellant Arzaga was charged jointly with one Tom Clark as defendants. Both were tried jointly and found guilty on both counts by verdict of a jury on October 8, 1948, in the District Court for the Southern District of California, Southern Division, at San Diego, California [R. 8]. Defendant Clark was sentenced to serve three years on each count and remanded to the custody of the Attorney General, the two sentences to run concurrently.

Appellant Arzaga was sentenced on October 8, 1948, to serve three and one-half years on each count, the two sentences to run consecutively [R. 9-10]. This appellant made a Motion to Correct Judgment and Sentence and said motion was denied as set forth in Jurisdictional Statement.

The grounds for correction of the Judgment and Sentence submitted to the District Court were substantially the same as those advanced herein upon appeal from the Court's denial of appellant's motion [R. 12 to 13, incl.]. Appellant's position in the lower court as here is first, that he was a victim of double jeopardy in being convicted on two counts of an indictment arising out of one transaction, and became subject to double punishment, contrary to the Fifth Amendment of the Constitution, because, he contends the same evidence was necessary to prove and establish either or both offenses [R. 12 and 13, also App. Br. p. 2].

Questions Involved.

I. Whether Conviction and Sentence on two separate Counts of an Indictment charging importation of a Narcotic Drug contrary to Law and Concealment after such importation constitutes Double Jeopardy in violation of the Constitution?

II. Whether or not different Evidence is required to prove two Counts of an Indictment which charges illegal importation and concealment and transportation after such importation so as to render the Fifth Amendment inapplicable?

III. Whether or not Separate Sentences for offenses charged under separate Counts, first that of importation contrary to law, and second, the Concealment after such importation, constitutes Double Punishment?

ARGUMENT.

Summary.

The contention of the appellant in this case that he was a victim of double jeopardy is without merit. The law is well settled in this Circuit and it appears to be the prevailing majority rule in other jurisdictions that where an indictment charges two or more counts, based upon a statute which authorizes more than one offense, the fact that a defendant, convicted of more than one count at the same trial, does not violate the Fifth Amendment to the Constitution. The Morgan case cited by the appellant points out that Congress has the sole authority to define and enumerate criminal offenses and it has clearly done so in the case of the statute involved here. Both the illegal importation of a narcotic drug and the transportation or concealment after such illegal importation are defined as separate offenses.

The appellant next raises the question as to whether or not the same evidence is required to prove both counts of an indictment under the statute. Such is not the case as different elements are involved in each count and a simple analysis of the requirements to prosecute and prove each count demonstrates the fallacy of this premise. Apparently, his theory is based upon the line of cases that hold that the test of double jeopardy is that where the evidence is required to prove one indictment and a defendant is later charged and tried for a similar offense the courts generally do not allow a second prosecution where the evidence is the same. As stated above, the two counts were separate and distinct and this Court has so held on similar occasions in the past.

The third point raised by the appellant raises the issue of double punishment. He contends that inasmuch as he

has almost completed punishment on the first count, the Court should relieve him of punishment and sentence on the second count, which was made to run consecutively by the trial court. Again, there is no merit to this position as the courts have held again and again where there are distinct and separate counts, separate punishments may be imposed for each and every offense. It was so held in the *Morgan* case cited by the appellant and decided by the Supreme Court. It is submitted that the other cases cited by the appellant are to be distinguished or do not support the position taken by the appellant. The order of the lower court denying his motion to correct judgment and sentence should, therefore, be affirmed.

POINT I.

Conviction and Sentence on Both Counts of an Indictment That Charges Illegal Importation of a Narcotic Drug and Concealment After Such Importation, Does Not Constitute Double Jeopardy in Violation of the Constitution.

At the outset it may be observed that the record discloses no other appeal perfected by this appellant from the Judgment of the court below. There is no showing of an unfair trial, nor was there any motion made for a new trial. Thus, appellant urges his cause before this Court of Appeals for the first time upon an issue of law urging in effect that the court below was in error by refusing to vacate the Judgment, and set aside or correct the sentence, especially that imposed on the second count.

Section 2255 of Title 28, United States Code, does provide for such a remedy provided the sentence imposed was in violation of the Constitution or the laws of the United States, or that the court was without jurisdiction to im-

pose such sentence, or that the sentence was in excess of the maximum authorized by law.

The claim of appellant Arzaga that the sentence imposed upon the two counts of this indictment violates the guarantee of the Constitution against double jeopardy is without merit. The law in this jurisdiction appears to be well settled on this point as applied to the case presented here. In the recent case of *Shafer v. United States*, 1950, 179 F. 2d 929, this court held that an appeal based upon such grounds was frivolous and was therefore dismissed.

The defendant there was indicted with others on three counts. The first was for receiving after importation of a narcotic drug, knowing it to have been imported contrary to law. The second, that he knowingly purchased a narcotic drug which was not in or from the original stamped package. The third, charged all defendants with conspiracy to import and receive this narcotic drug into the United States from Mexico. The trial court dismissed Counts 2 and 3 during trial. This court said on page 930 that the dismissal was not inconsistent with entry of judgment on Count 1, even if the same element was involved in each of the three. It said further that even a verdict of acquittal on the last count and of guilty on the first would be sustained, since a verdict need not be consistent, citing *Dunn v. United States*, 284 U. S. 390, and *Robinson v. United States*, 9 Cir. 175 F. 2d 4, 10. This Court further said that if the transaction was the same in all three counts, still a like result would follow for actually neither the incidents of Count 1, nor the crime attempted to be charged were the same as those set out in either Count 2 or Count 3.

In the *Shafer* case, under the question of double jeopardy, the case of *Barsock v. United States* was cited, 9

Cir., 177 F. 2d 141, together with other cases therein at page 143.

In that case this court held there was no merit in appellant's contention that where murder was charged in two counts and one dismissed during the trial, the appellant had been once in jeopardy.

In the last paragraph of the opinion on page 143, 177 F. 2d, we find the restatement of the law in this jurisdiction on the point in question as follows:

"This court has held that a dismissal of one count, where the indictment charges the same offense in two counts, even after all the evidence is in, does not operate as a bar to the subsequent indictment for the same offense. *Craig v. United States*, 9 Cir., 81 F. 2d 816, 819, certiorari denied, *Weinblatt v. United States*, 298 U. S. 690, 56 S. Ct. 959, 80 L. Ed. 1408, rehearing denied *Craig v. United States*, 299 U. S. 620, 57 S. Ct. 6, 81 L. Ed. 457; *O'Malley v. United States*, 8 Cir., 128 F. 2d 676, 684; cf. *Dunn v. United States*, 284 U. S. 390, 393, 52 S. Ct. 189, 76 L. Ed. 356, 80 A. L. R. 161. In the *Craig* case an earlier trial had resulted in the discharge of the jury for failure to agree after the defendant had successfully moved for a dismissal of one of the two counts charging the same offense. On a second trial for the same offense, the defendant's plea of former jeopardy was overruled by the trial court, and this court affirmed. Assuming that the same offense is charged in both counts of the indictment in the present case, if a second trial would not be barred, *a fortiori*, a submission of the first count to the jury in the same trial would not violate appellant's right not to be placed twice in jeopardy for the same offense."

Also, it was held that a trial on consolidated indictments for unlawfully selling, receiving and concealing morphine, was not double jeopardy in *Silverman v. U. S.* (C. C. A. Mass. 1932), 59 F. 2d 636, cert. den. 53 S. Ct. 89, 287 U. S. 640.

Therefore it is submitted that no question of double jeopardy is present in law or fact here as appellant was convicted and sentenced on two counts of an indictment wherein he was charged with first having imported a narcotic drug, namely smoking opium into the United States from Mexico, contrary to law, and second, having received, concealed, and facilitated the transportation and concealment after importation of said opium, which had been imported contrary to law.

POINT II.

Evidence Required to Prove All Essential Elements of One Count of an Indictment Charging Illegal Importation Would Not Be the Same as That Necessary to Prove Concealment of a Narcotic Drug After Importation Contrary to Law.

A. Two or More Separate and Distinct Offenses Are Defined Within the Statute Which Contain Different Elements and Require Separate Proof.

The appellant contends that since both counts of the indictment in which he was charged are based upon the same statute, Title 21 United States Code, Section 174, and that importation contrary to law was charged in count one, and concealment of the opium after importation is charged in count two, the same evidence is required to prove both counts. A simple legal analysis demonstrates the contrary. First, the government had to prove that he did knowingly import the opium into the United States from Mexico con-

trary to law. Secondly, it had to prove that he concealed, received and facilitated the transportation and concealment *after* the opium had been imported to establish the offense under count two.

The statute enumerates several possible offenses connected by the word OR, which could be committed by one defendant and charged in separate counts of one indictment. The evidence would not be the same in order to prove any two counts. In the instant case, the second offense would not be possible until the first had been committed. Different witnesses, different documents, and a new set of circumstantial evidence might be required to establish the concealment or transportation. In the first, the proof that opium was brought across the border by the appellant, a false declaration to Customs Officials, the absence of authority to bring it in would have to be proved. In the second count, evidence that he received the opium from some third person, the fact that he concealed it or secreted it to avoid its detection, or transportation from one point to another within the United States after importation, would establish guilt.

The appellant is apparently confused by the rule of law that where it is necessary in proving one offense to prove every essential element of a former offense growing out of the same act, conviction of the former is a bar to prosecution for the latter. Authority for this rule may be found in the case of *Krench v. United States*, 42 F. 2d 354. This principle does not apply here.

In the *Krench* case the appellant contended that Counts One and Two were duplicitous. The two counts in that indictment were brought under the Tariff Act, 1922, Section 593(b), 193 U. S. C. 497, charging importation first, and concealment after importation of merchandise. The court

held that the two counts did not charge the same offense, but the statute makes it an offense to bring merchandise into the United States contrary to law, also to conceal it knowing the same to have been brought in unlawfully.

The appellant cites the Supreme Court case of *Morgan v. DeVine*, 237 U. S. 632, 641, as authority for the proposition that where a statute requires proof of the same ingredients in each crime, the accused can be placed in jeopardy but once, although it may be necessary to prove some additional element in order to sustain the second charge. It must be noted that the *Morgan* case does not support the appellant's theory but, on the contrary, supports the entire case of the appellee in showing that the two offenses here were separate and distinct. In that case the appellant was charged with breaking into a post office in the first count, and second that he committed larceny therein. He was convicted under both counts, and was sentenced under each separately. The sentences to run consecutively. The situation was very similar to that of the appellant Arzaga in the present case on appeal. The Supreme Court held that it is within the power of Congress to say what shall be offenses against the law, and that the offense of breaking into a post office and the other of stealing property belonging to it, may be separately charged under the statute and separately punished.

It was held under the Narcotics Drugs Import and Export Act in the case of *Palmero v. United States* (C. C. A. Mass. 1940), 112 F. 2d 922, that importation and bringing into the United States of opium and the concealment of same thereafter constituted separate and distinct offenses.

It was held by this court in *Kramer v. United States* (C. C. A. Cal. 1945), 147 F. 2d 202, that conviction of the offense of importation of opium into the United States and the transportation therein did not bar a conviction of conspiracy to commit such offenses.

POINT III.

Separate and Consecutive Sentences for the Offenses of Illegal Importation of a Narcotic Drug and Concealment After Such Importation Do Not Constitute Double Punishment.

This court considered the precise question of law raised here in the case of *Gargano v. United States* (C. C. A. 9, 1944), 140 F. 2d 118. In that case the appellant was indicted under the same statute as appellant Arzaga, namely Section 174 of Title 21, United States Code. Count One charged he facilitated the transportation of a certain lot of morphine, illegally imported. In the second count he was charged with having concealed the same lot of morphine. He was convicted and sentenced on all counts of the indictment. Long afterward Gargano moved the District Court to vacate and set aside that part of the judgment which sentenced him on Count 2, on the ground that part of the judgment was void because Counts 1 and 2 charged a single offense. The motion was denied and he appealed from the order.

On page 119, the court said:

“Obviously these counts charged *distinct offenses*. We accordingly hold that appellant’s motion was not well founded.”

In a more recent case this Court held that an indictment which alleged in one count that defendant dispensed

smoking opium not in or from the original stamped package, and alleged in another count that he concealed and facilitated the concealment of such opium knowing it to have been unlawfully imported, charged two distinct offenses which authorized the imposition of two sentences.

Sorrentino v. United States (C. C. A. Cal. 1947),
163 F. 2d 627.

To the same effect, where the narcotic drug in question was heroin, this Court held the indictment charged two separate offenses and two separate sentences imposed were authorized.

Bruno v. United States (C. C. A. Cal., 1947), 164
F. 2d 693, cert den. 68 S. Ct. 459, 333 U. S.
832, 92 L. Ed. 1117.

In an older case, but in the Sixth Circuit, yet closely parallel to the issue here, it was held in *Gorsuch v. United States*, 34 F. 2d 279 (1929), that the receiving and concealment of smuggled liquor in violation of 19 United States Code, Section 497, also Section 593 of the Tariff Act of 1922, alleged in one count and the transportation of such smuggled liquor to another place, constituted separate offenses. It was further held that separate sentences for such offenses charged under such different counts of an indictment did not constitute "double punishment."

In the case of *Powers v. United States* (C. C. A. 5, 1923), 294 Fed. 512, 514, the Court held the imposition of separate punishments for separate counts was proper. There, the first count charged a violation of The National Prohibition Act, and the second an offense against Customs. Though arising out of *one transaction*, the Court

said they were separate offenses and justified the imposition of separate punishment.

Therefore, it is submitted that appellant Arzaga's contention on this point is without merit.

Conclusion.

Since the questions of law advanced by appellant here have been raised before in this Court and decided adversely, we must conclude that the law is well settled in this jurisdiction on these points. The two counts of the indictment upon which he was charged, convicted and sentenced, constituted two separate offenses, and the imposition of separate sentences constituted no reversible error by the trial court. Appellant was not the victim of double punishment nor was he placed in double jeopardy in violation of the Fifth Amendment to the Constitution. The Court below properly denied the motion to correct Judgment and Sentence, and it is submitted that said Order should be affirmed.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney,

WALTER S. BINNS,
Chief Assistant U. S. Attorney,

RAY H. KINNISON,
Assistant U. S. Attorney,

HERSCHEL E. CHAMPLIN,
Assistant U. S. Attorney,

Attorneys for Appellee.

No. 12828

United States
Court of Appeals
for the Ninth Circuit.

ALICE McCOURT LAMM,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED

MAR 22 1951

PAUL P. O'BRIEN,

CLERK

No. 12828

United States
Court of Appeals
for the Ninth Circuit.

ALICE McCOURT LAMM,

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vs.

COMMISSIONER OF INTERNAL REVENUE,
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Transcript of Record

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of the United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner :

SIGVALD NIELSON, ESQ.,

HARRY R. HORROW, ESQ.,

ALBERT G. SHULTS, ESQ.,

FRANCIS N. MARSHALL, ESQ.

For Respondent :

T. M. MATHER, ESQ.

The Tax Court of the United States

Docket No. 21724

ALICE McCOURT LAMM,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1949

Feb. 7—Petition received and filed. Taxpayer notified. Fee paid.

Feb. 8—Copy of petition served on General Counsel.

Feb. 7—Request for Circuit hearing in San Francisco filed by taxpayer. 3/3/49 Granted.

Mar. 15—Answer filed by General Counsel.

Mar. 15—Request for hearing in Portland, Oregon, filed by General Counsel. 3/16/49 Denied.

Mar. 17—Copy of answer served on taxpayer, San Francisco, Calif.

Sept. 9—Hearing set Nov. 7, 1949, San Francisco, Calif.

Nov. 15—Hearing had before Judge Harron, on merits. Proceedings consolidated for hearing #21725, 21726, 22126 to 22133, 22635 to 22638. Appearance of Francis N. Mar-

1949

shall filed. Stipulation of facts, with exhibits 1-A through 4-D filed. Joint motion to consolidate granted, copy served. Brief Jan. 13, 1950; replies Feb. 13, 1950.

Dec. 12—Transcript of hearing 11/15/49 filed.

1950

Jan. 11—Brief filed by taxpayer. Served 1/13/50.

Jan. 12—Brief filed by General Counsel. Served 1/13/50.

Feb. 13—Reply brief filed by taxpayer. Copy served.

Sept. 26—Findings of fact and opinion rendered, Harron, J. Decision will be entered for respondent. Copy served.

Sept. 26—Decision entered, Harron, J., Div. 13.

Dec. 26—Petition for review by U. S. Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Dec. 26—Proof of service filed.

1951

Jan. 16—Designation of contents of record on review, with proof of service thereon filed by taxpayer.

Jan. 24—Certified copy of order from U. S. Court of Appeals, Ninth Circuit, that petition-

1951

er's original Exhibit 8 be incorporated in the transcript of record on review in this case, and that a copy of this order be incorporated in the transcript of record on review, filed.

Jan. 24—Certified copy of order from U. S. Court of Appeals, Ninth Circuit, that the Clerk of this Court transmit a complete record in Dkt. No. 21724 and an abbreviated record in all the remaining cases to the U. S. Court of Appeals, Ninth Circuit; the complete record to be printed and the abbreviated cases to remain unprinted, filed.

The Tax Court of the United States
Docket No. 21724

ALICE McCOURT LAMM,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated November 26, 1948, bearing symbols

IT:90D:EEH, and as a basis for her petition alleges as follows:

1. Petitioner herein is Alice McCourt Lamm, an individual, residing at Modoc Point, Oregon. Petitioner filed her federal income and victory tax return and kept her books of account for the calendar year ended December 31, 1943, on a cash receipts and disbursements basis. Said return was filed with the Collector of Internal Revenue for the District of Oregon.

2. The taxes in dispute are proposed deficiencies in federal income and victory taxes for the calendar year 1943 in the amount of \$4,246.73.

3. The notice of deficiency, a copy of which is attached hereto marked "Exhibit A" and made a part of this petition, was mailed to petitioner on November 26, 1948.

4. The determination of taxes set forth in said notice of deficiency is based on the following errors:

(a) The Commissioner erred in determining that the gain of \$7,951.76 realized by petitioner on the retirement of notes of the Lamm Lumber Company was taxable as ordinary income rather than as a long term capital gain under the provisions of Section 117 of the Internal Revenue Code.

(b) The Commissioner erred in holding that said notes on which petitioner realized said gain were not in registered form at the time of retirement within the provisions of Section 117(f) of the Internal Revenue Code.

(c) The Commissioner erred in determining that there are due from petitioner deficiencies in income and victory taxes for the year 1943 in the amount of \$4,246.73.

5. The facts upon which petitioner relies as a basis for this petition are as follows:

(1) On and prior to July 1, 1941, Lamm Lumber Company, a corporation, engaged in the manufacture of lumber, had outstanding indebtedness in the amount of \$411,264.99, evidenced by its promissory notes bearing interest at the rate of 3 per cent per annum and secured by mortgages on certain of its properties. On said date said notes were owned by Southern Pacific Land Company, but were held in the name of Consolidated Securities Company, as trustee for said Southern Pacific Land Company.

(2) On July 1, 1941, petitioner and other persons purchased undivided interests in said notes and mortgages for the aggregate sum of \$205,632.50 and caused said notes and mortgages to be endorsed, transferred and delivered to American Trust Company, hereinafter referred to as the "Bank," as agent and registrar with respect to said notes. Thereupon, petitioner and each of said persons who made such purchase entered into an agreement with the Bank dated July 9, 1941, under the terms of which said notes and mortgages remained in the possession of the Bank until said notes were retired in 1943.

(3) The amount paid by petitioner for her participating interest in said notes and mortgages was

\$8,000, or 3.890436 per cent of the aggregate purchase price, and petitioner thereby owned a participating interest in said notes and mortgages in said percentage.

(4) Petitioner's participating interest was recorded on the list or register maintained by the Bank showing the owners of participating interests in said notes, and under the terms of the aforesaid agreement petitioner was entitled to receive said percentage of the principal and interest payments received on said notes by the Bank as long as she appeared on the records of the Bank as the owner of said participating interest.

(5) Petitioner did not transfer any portion of the participating interest so acquired by her and remained the owner thereof until said notes were retired.

(6) Said agreement was entered into with the knowledge and consent of Lamm Lumber Company and said corporation agreed to pay the Bank \$250 a year and a closing fee of \$250 for its services in acting as agent and registrar. The remaining portion of the fees of the Bank for such services was paid by the owners of participating interests.

(7) The Bank, under the terms of said agreement, was required to make and made disbursement of principal and interest payments received on said notes to petitioner and other persons owning participating interests therein, as shown on its register of owners of participating interests, and the Bank was under no duty to take notice of any change in the ownership of any participating interest unless

and until there was filed with the Bank such documentary evidence as it would deem necessary to establish such change.

(8) On December 7, 1943, said notes were retired by the payment of the balance of the principal due thereon. During the year 1943 petitioner realized a gain of \$7,951.76 on the retirement of said notes. At the time said notes were retired they were in registered form within the provisions of Section 117(f) of the Internal Revenue Code.

(9) Said gain received by petitioner was reported in her income and victory tax return for the calendar year 1943 as a long term capital gain, of which 50 per cent or \$3,975.88 was included in income. In arriving at the deficiencies involved in this proceeding respondent erroneously determined that said notes were not in registered form at the time of retirement and that said gain of \$7,951.76 was not taxable as a long term capital gain but was taxable as ordinary income.

Wherefore, petitioner prays that this court may hear this proceeding, redetermine the deficiency involved herein by correction of the errors alleged herein, and grant such other relief as may be proper.

Dated: San Francisco, California, January 28, 1949.

/s/ SIGVALD NIELSON,

/s/ HARRY R. HORROW,

/s/ ALBERT J. SHULTS,

Attorneys for Petitioner.

State of California,
City and County of San Francisco—ss.

Alice McCourt Lamm, being duly sworn, deposes and says that she is the petitioner named in the foregoing petition; that she has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those she believes to be true.

/s/ ALICE McCOURT LAMM.

Subscribed and sworn to before me this 28th day of January, 1949.

[Seal] /s/ CHALMER MUNDAY,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Oct. 29, 1949.

EXHIBIT A

Treasury Department
Internal Revenue Service
Seattle 1, Washington

November 26, 1948

Office of
Internal Revenue Agent in Charge
Seattle Division
305-A Jones Building
1331 Third Avenue

IT :90D :EEH

Mrs. Alice McCourt Lamm
Modoc Point, Oregon

Dear Mrs. Lamm:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1943, discloses a deficiency of \$4,246.73, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward

it to the Internal Revenue Agent in Charge, Seattle 1, Washington, for the attention of IT:90D:EEH. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,

Commissioner,

By L. D. HALLOWELL,

Acting Internal Revenue

Agent in Charge.

Enclosures:

Statement

Form of waiver

EEH:mhe

IT:90D:EEH

Statement

Mrs. Alice McCourt Lamm

Modoc Point, Oregon

Tax Liability for the Taxable Year Ended December 31, 1943

	Deficiency
Income Tax	\$4,246.73

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated March 1, 1947, and to your protest dated May 12, 1947.

A copy of this letter and statement has been mailed to your representative, Mr. H. Edwin Nowell, Crocker Building, San Francisco 4, California, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1943

Adjustments to Net Income

	Income Tax Net Income		Victory Tax Net Income	
Net income as disclosed by return, Form 1040	\$46,682.06		\$44,699.32	
Unallowable deductions and additional income:				
(a) Ordinary gain	\$7,951.76		\$7,951.76	
(b) Partnership income	517.54	3,469.30	517.54	8,469.30
Total	\$55,151.36		\$53,168.62	
Nontaxable income and additional deductions:				
(c) Capital gain	\$3,975.88			
(d) Contributions	58.33	4,034.21		
Net income adjusted	\$51,117.15		\$53,168.62	

Explanation of Adjustments

- (a) Ordinary gain
- (c) Capital gain

On your return for 1943 there was reported a long-term capital gain of \$3,975.88, being 50 per cent of the gain of \$7,951.76 realized by you through collection of notes of the Lamm Lumber Company in which you owned a participating interest of 3.890436%. You contend that such gain was derived from the retirement of notes or other evidences of indebtedness issued by a corporation in registered form, and therefore constitutes a capital gain under the provisions of Section 117(f), Internal Revenue Code. Information submitted indicates that you did not hold notes or other evidences of indebtedness in registered form and Section 117(f), Internal Revenue Code, does not apply to the loan transaction in which you participated. The amount of \$3,975.88 is eliminated from capital gains reported on your return, and there is included as ordinary income the amount of \$7,951.76 subject to both income and victory tax.

- (b) Partnership income

Your distributive share of the partnership income of Deschutes Lumber Co., amounting to \$44,972.37, was reported as \$44,454.83 on your return. Your income tax net income and victory tax net income are therefore increased by the difference of \$517.54 in the amounts shown.

- (d) Contributions

Your income tax net income is reduced \$58.33, representing the amount of allowable contributions not claimed as a deduction on your return.

Computation of Income and Victory Tax

Income tax net income adjusted.....	\$51,117.15
Less: Personal exemption	None
Surtax net income	\$51,117.15
Less: Earned income credit	300.00
Balance subject to normal tax.....	\$50,817.15
Normal tax at 6 per cent	\$ 3,049.03
Surtax on \$51,117.15	23,977.32
Total income tax	\$27,026.35
Victory tax net income	\$53,168.62
Less: Specific exemption	624.00
Income subject to victory tax.....	\$52,544.62
Victory tax before credit	\$ 2,627.23
Less: Victory tax credit	500.00
Net victory tax	\$ 2,127.23
Net income tax and victory tax.....	\$29,153.58
Income tax for 1942	\$10,114.31
Larger of above two amounts.....	\$29,153.58
Forgiveness feature:	
(a) Smaller of above two amounts	\$10,114.31
(b) Amount forgiven— ¾ of above amount.....	7,585.75
(c) Amount forgiven	\$ 2,528.58
Total income and victory tax liability.....	\$31,682.16
Income and victory tax liability disclosed by return—	
Original, Account No. 908020	27,435.43
Deficiency in income and victory tax.....	\$ 4,246.73

Received and Filed T.C.U.S. February 7, 1949.

Served February 8, 1949.

[Title of Tax Court and Cause.]

REQUEST FOR PLACE OF HEARING

Petitioner hereby requests that the above-entitled proceeding be placed upon the circuit calendar for hearing on the merits at San Francisco, California.

Petitioner's counsel are located in San Francisco, and a hearing in that city will result in the least inconvenience and expense to petitioner.

Dated: San Francisco, California, February 1, 1949.

/s/ SIGVALD NIELSON,

/s/ HARRY R. HORROW,

/s/ ALBERT J. SHULTS,

Attorneys for Petitioner.

[Stamped]: Granted Mar. 3, 1949.

/s/ BOLON B. TURNER,

Judge.

Received and filed T. C. U. S. February 7, 1949.

Served Mar. 4, 1949.

[Title of Tax Court and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits that the petitioner herein is Alice McCourt Lamm, an individual, residing at Modoc Point, Oregon. Admits that petitioner filed her Federal income and victory tax return with the Collector of Internal Revenue for the District of Oregon. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining material allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Denies that he erred in his determination of the deficiency as shown by the notice of deficiency, from which petitioner's appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph 4(a), (b) and (c) of the petition.

5. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph 5(1) to (9), inclusive, of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's ap-

peal be denied and that the Commissioner's determination of deficiency be approved.

/s/ CHARLES OLIPHANT, JHP
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

WILFORD H. PAYNE,
Division Counsel,
JOHN H. PIGG,
R. G. HARLESS,
Special Attorneys,
Bureau of Internal Revenue.

Received and filed T. C. U. S. March 15, 1949.

[Title of Tax Court and Cause.]

JOINT MOTION FOR CONSOLIDATION OF PROCEEDINGS

Come now the parties to the above-entitled proceedings, by their respective counsel, and move for an order of the court to consolidate the fifteen proceedings in the cases set forth below, for hearing, briefing and decision:

Petitioner	Docket No.
Alice McCourt Lamm.....	21724
Estate of W. E. Lamm, Deceased, Alice McCourt Lamm, Executrix.....	21725
Winifred Carol Lamm.....	21726
Estate of Edith E. Lamm, Deceased, Edith Lamm, Executrix	22126
Edith Lamm	22127
Ethel Fisher	22128

Petitioner	Docket No.
Estate of Chas. C. Elliott, Deceased, Elsa Ehlers, Administratrix	22129
Estate of Eugene D. Elliott, Deceased, Beth L. Elliott, Executrix, and Beth L. Elliott, Surviving Wife	22130
Bess Kent	22131
Joseph S. Kent.....	22132
Rolland G. Watt and Adele C. Watt.....	22133
Elsa Ehlers, formerly Elsa Natalie.....	22635
William E. Elliott.....	22636
H. Edwin Nowell.....	22637
Elizabeth V. Nowell.....	22638

In support of this motion the parties state:

1. All cases involve identical issues of fact and of law arising out of the same transaction, and consolidation of the proceedings will save the time of the parties and of the court.

Wherefore, the parties jointly pray that the court will grant this motion.

/s/ SIGVALD NIELSON,
 /s/ HARRY R. HORROW,
 /s/ ALBERT J. SHULTS,
 Counsel for Petitioners.
 /s/ CHARLES OLIPHANT,
 Counsel, Bureau
 Of Internal Revenue.
 /s/ MARION J. HARRON,
 Judge.

[Stamped]: Granted November 15, 1949.

Filed T.C.U.S., November 15, 1949.

Served November 15, 1949.

[Title of Tax Court and Cause.]

Docket Nos. 21724, 21725, 21726, 22126, 22127,
22128, 22129, 22130, 22131, 22132, 22133,
22635, 22636, 22637 and 22638

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the following facts shall be taken to be true and received as evidence for all purposes of this proceeding, subject to the right of either party to introduce any further evidence not inconsistent with or contrary to the facts herein stipulated.

1. Petitioners are individuals except in the cases of the estate of W. E. Lamm, deceased, the estate of Edith E. Lamm, deceased, and the estate of Eugene D. Elliott, deceased, in each of which the petitioner is the duly qualified, appointed and acting executrix under the will of the deceased, and in the case of the estate of Charles C. Elliott, deceased, in which the petitioner is the duly qualified, appointed and acting administratrix of said estate.

The petitioners and their addresses are as follows:
Alice McCourt Lamm, Modoc Point, Oregon;
Estate of W. E. Lamm, Deceased, Alice McCourt
Lamm, Executrix, Modoc Point, Oregon;
Winifred Carol Lamm, Modoc Point, Oregon;
Estate of Edith E. Lamm, Deceased, Edith Lamm,
Executrix, 1415 Ocean Avenue, Santa Monica,
California;

Edith Lamm, 1415 Ocean Avenue, Santa Monica, California;

Ethel Fisher, 169 Lacumbre Road, Santa Barbara, California;

Estate of Chas. C. Elliott, Deceased, Elsa Ehlers, Administratrix, 2490 Lambert Drive, Pasadena, California;

Estate of Eugene D. Elliott, Deceased, Beth L. Elliott, Executrix, and Beth L. Elliott, Surviving Wife, 3548 Fourth Avenue, San Diego, California;

Bess Kent, 333 Montgomery Street, San Francisco 4, California;

Joseph S. Kent, 333 Montgomery Street, San Francisco 4, California;

Rolland G. Watt and Adele C. Watt, 1621 Riverside Drive, Redding, California;

Elsa Ehlers, formerly Elsa Natalie, 2490 Lambert Drive, Pasadena, California;

William E. Elliott, 100 North Normandie, Los Angeles 4, California;

H. Edwin Nowell, 601 Crocker Building, San Francisco 4, California;

Elizabeth V. Nowell, 601 Crocker Building, San Francisco 4, California.

The federal income and victory tax returns of petitioners (petitioners' decedents in the cases of the four estates) for the calendar year ended December 31, 1943, were filed with the Collector of Internal Revenue for the appropriate districts as follows:

Alice McCourt Lamm, District of Oregon;

Estate of W. E. Lamm, Deceased, Alice McCourt

Lamm, Executrix, District of Oregon;
 Winifred Carol Lamm, District of Oregon;
 Estate of Edith E. Lamm, Deceased, Edith Lamm,
 Executrix, Sixth District of California;
 Edith Lamm, Sixth District of California;
 Ethel Fisher, Sixth District of California;
 Estate of Chas. C. Elliott, Deceased, Elsa Ehlers,
 Administratrix, Sixth District of California;
 Estate of Eugene D. Elliott, Deceased, Beth L.
 Elliott, Executrix, and Beth L. Elliott, Surviv-
 ing Wife, Sixth District of California;
 Bess Kent, First District of California;
 Joseph S. Kent, First District of California;
 Rolland G. Watt and Adele C. Watt, First District
 of California;
 Elsa Ehlers, formerly Elsa Natalie, Sixth District
 of California;
 William E. Elliott, Sixth District of California;
 H. Edwin Nowell, First District of California;
 Elizabeth V. Nowell, First District of California.

2. The notices of deficiency involved in these proceedings were mailed to petitioners on the following dates:

Petitioner	Docket No.	Date
Alice McCourt Lamm	21724	Nov. 26, 1948
Alice McCourt Lamm, Executrix Estate of W. E. Lamm, Deceased.....	21725	Nov. 26, 1948
Winifred Carol Lamm	21726	Nov. 26, 1948
Edith Lamm, Executrix Estate of Edith E. Lamm, Deceased.....	22126	Jan. 26, 1949
Edith Lamm	22127	Jan. 26, 1949
Ethel Fisher	22128	Jan. 26, 1949
Elsa Ehlers, Administratrix Estate of Chas. C. Elliott, Deceased.....	22129	Jan. 26, 1949
Estate of Eugene G. Elliott, Deceased.....	22130	Jan. 26, 1949
Beth L. Elliott, Executrix, and Beth L. Elliott, Surviving Wife		

Petitioner	Docket No.	Date
Bess Kent	22131	Feb. 3, 1949
Joseph S. Kent	22132	Feb. 3, 1949
Rolland G. Watt and Adele C. Watt.....	22133	Feb. 3, 1949
Elsa Ehlers, formerly Elsa Natalie.....	22635	Jan. 26, 1949
William E. Elliott	22636	Jan. 26, 1949
H. Edwin Nowell	22637	Feb. 3, 1949
Elizabeth V. Nowell	22638	Feb. 3, 1949

3. The deficiencies determined by the Commissioner are in federal income and victory taxes for the calendar year 1943 in the following amounts:

Petitioner	Docket No.	Amount
Alice McCourt Lamm	21724	\$4,246.73
Estate of W. E. Lamm, Deceased.....	21725	9,345.83
Winifred Carol Lamm	21726	2,472.21
Alice McCourt Lamm, Executrix		
Estate of Edith E. Lamm, Deceased.....	22126	7,393.25
Edith Lamm, Executrix		
Edith Lamm	22127	7,487.04
Ethel Fisher	22128	7,012.02
Elsa Ehlers, Administratrix		
Estate of Chas. C. Elliott, Deceased.....	22129	1,559.01
Beth L. Elliott, Executrix, and		
Beth L. Elliott, Surviving Wife		
Estate of Eugene D. Elliott, Deceased.....	22130	1,164.99
Bess Kent	22131	508.84
Joseph S. Kent	22132	437.34
Rolland G. Watt and Adele C. Watt.....	22133	8,478.60
Elsa Ehlers, formerly Elsa Natalie.....	22635	5,863.86
Edith Lamm, Guardian		
Estate of William E. Elliott, Incompetent.....	22636	7,292.33
H. Edwin Nowell	22637	261.80
Elizabeth V. Nowell	22638	261.77

4. Within the time limit specified in the respective notices of deficiency mailed by the Commissioner to each petitioner, each petitioner filed in the above-entitled court a petition for redetermination of the deficiency assessed by respondent. Subsequent to the filing of each petition, petitioners in the

following numbered cases mailed to the Collector of Internal Revenue for his or her appropriate district a check in full payment of the deficiency determined by the Commissioner against him or her plus interest in the following amounts:

Docket No.	Deficiency	Interest	Total	Date
21724	\$4,246.73	\$1,281.00	\$5,527.73	4/ 8/1949
21725	9,345.83	2,822.18	12,168.01	4/..../1949
22126	7,393.25	2,269.52	9,662.77	5/28/1949
22126	7,393.25	2,269.52	9,662.77	5/28/1949
22127	7,487.07	2,298.32	9,785.39	5/28/1949
22128	7,012.02	2,172.09	9,184.11	5/31/1949
22129	1,559.01	491.90	2,090.91	5/28/1949
22130	1,164.99	357.81	1,522.80	5/28/1949
22131	508.54	156.11	664.65	6/ 1/1949
22132	437.34	134.25	571.59	6/ 1/1949
22133	8,478.60	2,605.48	11,084.08	6/ 3/1949
22635	5,863.86	1,837.07	7,700.93	6/24/1949

In each case the sum was paid subject to the decision of the above-entitled court in these proceedings and under the statement that such payment is not an acknowledgment that petitioners are liable for any part of the payment or any part of the deficiency asserted.

5. On May 6, 1930, and on September 5, 1930, respectively, Lamm Lumber Company, a corporation, issued two promissory notes in the respective principal sums of \$150,000 and \$250,000, payable to the order of Consolidated Securities Company, hereinafter referred to as "Consolidated," in consideration of loans from the latter in those two sums. Each of said notes was secured by a mortgage on a certain railroad owned by Lamm Lumber Company, and as part of the same transactions, Lamm Lumber Company gave options to Consoli-

dated to purchase said railroad in preference to any other purchaser on the same terms. On May 26th and September 30, 1930, Consolidated executed respective declarations of trust that it held said notes, mortgages and options for the benefit of Southern Pacific Land Company, and at all times prior to July 1, 1941, said Southern Pacific Land Company was the beneficial owner of said notes, mortgages and options.

From March 5, 1932, to September 5, 1934, various additional notes were issued by Lamm Lumber Company to Consolidated representing unpaid interest on said corporate indebtedness. On December 24, 1936, Lamm Lumber Company and Consolidated entered into a supplementary agreement reciting the indebtedness and mortgages, compromising the unpaid interest as to its amount, funding the said interest and accruals to January 1, 1938, by adding them to the principal, restating the new principal at January 1, 1938, as \$497,845, and stating interest from January 1, 1938, to be 3 per cent. Lamm Lumber Company, the obligor, covenanted to pay monthly \$5 for each car of logs shipped over the railroad with minimum payments of \$15,000 a year until December 31, 1941, and \$35,000 a year thereafter, said payments to be first applied on interest and then on principal. A copy of each of said notes hereinabove mentioned and of said agreement is attached hereto, collectively marked "Exhibit 1-A," and deemed incorporated herein.

On February 8, 1940, Consolidated endorsed to

The Anglo California National Bank of San Francisco all of said promissory notes, without recourse, and assigned to said bank its rights as mortgagee.

At various times from February 10, 1938, to June 11, 1941, Lamm Lumber Company made payments on the debt in accordance with said agreement of December 24, 1936, so that as of June 12, 1941, the sum owing by Lamm Lumber Company to Southern Pacific Land Company was \$411,264.99. All of said notes were then on their face past due.

6. For some time prior to July 1, 1941, Southern Pacific Land Company had been desirous of liquidating its lumber interests in Northern California and Oregon and let it be known that it would be willing to sell its interest in the Lamm Lumber Company notes at a substantial discount. In order to avail themselves of the investment opportunity thus presented, certain individuals, including petitioners herein (petitioners' decedents in the cases of the four estates) each on his or her own behalf, offered to purchase at the proffered discount undivided fractional interests in said notes, making in total 100 per cent of the ownership of said notes. These offers were presented to Southern Pacific Company (parent company of Southern Pacific Land Company) on behalf of Southern Pacific Land Company as an offer to purchase the total ownership of said notes for a sum amounting to 50 per cent of the balance of the principal of the loan plus the interest currently due at the time of the completion of the purchase. Such offer was subsequently accepted by Southern Pacific Company on

behalf of Southern Pacific Land Company, and on July 1, 1941, said individuals paid over to said Southern Pacific Land Company the various amounts agreed to be paid by them for the purchase of said undivided fractional interests and totaling the sum of \$206,388.55, and the beneficial ownership of said notes and mortgages was transferred from Southern Pacific Land Company to said individuals in proportion to their undivided fractional interests.

7. Said individuals, as beneficial owners of said undivided fractional interests in said notes by virtue of the purchase related in paragraph 6 above, entered into a written agreement called "Instructions and Agreement," dated July 15, 1941, with American Trust Company, hereinafter referred to as "Trust Company," a copy of which form of agreement is hereto attached, marked "Exhibit 2-B," and deemed incorporated herein. In executing said agreement each of said individuals signed an individual counterpart thereof, stating therein his or her percentage interest in said notes. Contemporaneously with the delivery of said Instructions and Agreement to Trust Company, said individuals delivered to Trust Company a list of the names, addresses, amounts invested, and percentage interests of said individuals. A copy of said list is hereto attached, marked "Exhibit 3-C," and deemed incorporated herein.

Pursuant to said Instructions and Agreement, said notes were endorsed, and said mortgages assigned, to Trust Company to hold and keep in its

possession in accordance with the instructions contained in said Instructions and Agreement.

8. In accordance with said Instructions and Agreement (Exhibit 2-B), Trust Company duly remitted collections of interest and principal paid to it by Lamm Lumber Company to those owners shown to be entitled thereto in accordance with the ownership interests set forth in said Exhibit 3-C. During this period, none of said individuals sold or exchanged his undivided fractional interest in said notes. In several instances, however, certain owners changed their addresses, informing Trust Company of said change, and Trust Company thereupon mailed its remittances to the new addresses.

9. Trust Company's charges for its services in collecting and remitting interest and principal payments and in maintaining a record of ownership were shared by the participating owners of record and by Lamm Lumber Company in the following manner: As agreed in said Instructions and Agreement (Exhibit 2-B), Trust Company charged the sum of \$500 as an acceptance fee, an annual fee of \$100 plus $\frac{1}{10}$ of 1 per cent of the unpaid balance of the obligation at the beginning of each year, and \$250 as a closing fee, plus reimbursement for out-of-pocket expenses. Of these charges Lamm Lumber Company agreed by letter dated August 26, 1941, to Trust Company, a copy of which is hereto attached, marked "Exhibit 4-D," and deemed incorporated herein, to pay sums at the rate of \$250 per annum which were credited against the foregoing total charges.

10. On December 7, 1943, said notes were retired by payment of the balance of the principal and interest due thereon. During the year 1943 petitioners realized gains on the retirement of said notes in amounts proportionate to their fractional ownership thereof.

11. Said gains realized by petitioners were reported in their income and victory tax returns for the calendar year 1943 as long-term capital gains, of which 50 per cent were reported as income. In arriving at the deficiencies asserted in these proceedings, respondent determined that these obligations were not at the date of retirement in registered form within the meaning of section 117(f) of the Internal Revenue Code and that said gains were not taxable as long-term capital gains but were taxable as ordinary income.

Dated: November 1, 1949.

/s/ SIGVALD NIELSON,

/s/ HARRY R. HORROW,

/s/ ALBERT J. SHULTS,

Counsel for Petitioners.

/s/ CHARLES OLIPHANT,

Counsel, Bureau

Of Internal Revenue.

EXHIBIT 1-A

\$150,000.00

Modoc Point, Oregon, May 6th, 1930.

For value received, Lamm Lumber Company, an Oregon corporation, promises to pay to Consolidated Securities Company, a California corporation, or order, at the office of The Anglo & London Paris National Bank of San Francisco, in the City and County of San Francisco, State of California, One Hundred and Fifty Thousand (150,000) Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of five and one-half ($5\frac{1}{2}$) per centum per annum from date until paid. The interest herein provided for shall be paid semi-annually from date hereof, and said principal of this note shall be payable in installments of not less than Fifty Thousand (50,000) Dollars. The first of said installments is due and payable May 1, 1934, and a like installment at the end of each and every one year period thereafter until the whole of said principal sum of One Hundred and Fifty Thousand (150,000) Dollars shall have been fully paid. If any of said payments of either principal or interest is not paid when due, the whole of said principal sum and interest shall become immediately due and collectible at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, or any interest thereon, the said Lamm Lumber Company promises to pay such additional sum as the court may adjudge reasonable as attorneys' fees in said

suit or action. The entire unpaid principal, or any portion thereof, may, at the option of Lamm Lumber Company, be paid at any time before maturity.

LAMM LUMBER COMPANY,
By W. E. LAMM,
President.

Attest:

[Seal] J. S. KENT,
Secretary.

May 26, 1930

Interest in the amount of \$452.00 on this note is waived due to delayed payment of principal by Consolidated Securities Company; May 6, 1930, to May 26, 1930, twenty days, at $5\frac{1}{2}\%$.

THE ANGLO & LONDON PARIS NATIONAL
BANK OF SAN FRANCISCO,
R. R. ZELICK.

Interest Payments.

11/6/30—\$36.73.

5/6/31— 41.25.

11/6/31— 41.25.

February 23, 1940

Without recourse, pay to the order of The Anglo California National Bank of San Francisco.

CONSOLIDATED
SECURITIES COMPANY.
By H. L. MACHEN,
Vice President.

[Seal] By I. M. OTTO,
Assistant Secretary.

July 9, 1941.

Without recourse, pay to the order of The American Trust Company.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO,

By FRED V. VOLLMER,
Vice President,

By R. A. HOLMBERG,
Ass't Sect'y.

\$250,000.00.

Modoc Point, Oregon, September 5, 1930.

For value received, Lamm Lumber Company, an Oregon corporation, promises to pay to Consolidated Securities Company, a California corporation, or order, at the office of The Anglo & London Paris National Bank of San Francisco, in the City and County of San Francisco, State of California, Two Hundred and Fifty Thousand (250,000) Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of five and one-half ($5\frac{1}{2}$) per centum per annum from date until paid. The interest herein provided for shall be paid semi-annually from date hereof, and said principal of this note shall be payable in installments of not less than Fifty Thousand (50,000) Dollars. The first of said installments is due and payable May 1, 1937, and a like installment at the end of each and every one year period thereafter until the whole of said principal sum of Two Hundred and Fifty Thousand (250,000) Dollars shall have been fully paid. If

any of said payments of either principal or interest is not paid when due, the whole of said principal sum and interest shall become immediately due and collectible at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, or any interest thereon, the said Lamm Lumber Company promises to pay such additional sum as the court may adjudge reasonable as attorneys' fees in said suit or action. The entire unpaid principal, or any portion thereof, may, at the option of Lamm Lumber Company, be paid at any time before maturity.

LAMM LUMBER COMPANY,
By W. E. LAMM,
President.

Attest:

[Seal] J. S. KENT,
Secretary.

Interest Payments

3/7/31—\$6875.

9/5/31— 6875.

February 23, 1940

Without recourse, pay to the order of The Anglo
California National Bank of San Francisco

CONSOLIDATED SECURITIES
COMPANY,
By H. L. MACHEN,
Vice President.

By I. M. OTTO,
Assistant Secretary.

July 9, 1941

Without recourse, pay to the order of American Trust Company.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO.

By FRED V. VOLLMER,
Vice President.

By R. A. HOLMBERG,
Assistant Secretary.

March 5th, 1932

\$6,875.00

For value received, Lamm Lumber Company, an Oregon corporation, promises to pay, on demand, to Consolidated Securities Company, a California corporation, or order, at The Anglo California National Bank of San Francisco, San Francisco, California, Six Thousand Eight Hundred and Seventy-five (6,875.00) Dollars, in lawful money of the United States of America, with interest in like money at the rate of $5\frac{1}{2}$ per cent per annum from date until paid.

In case suit or action is instituted to collect this note, or any portion thereof, or interest thereon, said Lamm Lumber Company promises to pay such additional sum as the court may adjudge reasonable attorneys' fees in said suit or action.

LAMM LUMBER COMPANY,
By W. E. LAMM,
President.

Attest:

J. S. KENT,
Its Secretary.

February 23, 1940

Without recourse, pay to the order of The Anglo
California National Bank of San Francisco

CONSOLIDATED SECURITIES
COMPANY,

By H. L. MACHEN,
Vice President.

By I. M. OTTO,
Assistant Secretary.

July 9, 1941

Without recourse, pay to the Order of American
Trust Company.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO.

By FRED V. VOLLMER,
Vice President.

By R. A. HOLMBERG,
Assistant Secretary.

May 6th, 1932

\$4,125.00

For value received, Lamm Lumber Company, an
Oregon corporation, promises to pay, on demand,
to Consolidated Securities Company, a California
corporation, or order, at The Anglo California Na-
tional Bank of San Francisco, San Francisco, Cali-
fornia, Four Thousand One Hundred and Twenty-
five (4,125.00) Dollars, in lawful money of the
United States of America, with interest in like
money at the rate of 5½ per cent per annum from
date until paid.

In case suit or action is instituted to collect this note, or any portion thereof, or interest thereon, said Lamm Lumber Company promises to pay such additional sum as the court may adjudge reasonable attorneys' fees in said suit or action.

LAMM LUMBER COMPANY,
By W. E. LAMM,
President.

Attest:

J. S. KENT,
Its Secretary.

February 23, 1940

Without recourse, pay to the order of The Anglo
California National Bank of San Francisco

CONSOLIDATED SECURITIES
COMPANY,
By H. L. MACHEN,
Vice President.
By I. M. OTTO,
Assistant Secretary.

July 9, 1941

Without recourse, pay to the order of American
Trust Company.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO.

By FRED V. VOLLMER,
Vice President.
By R. A. HOLMBERG,
Assistant Secretary.

September 5th, 1932

\$6,875.00

For value received, Lamm Lumber Company, an Oregon corporation, promises to pay, on demand, to Consolidated Securities Company, a California corporation, or order, at The Anglo California National Bank of San Francisco, San Francisco, California, Six Thousand, Eight Hundred and Seventy-five (6,875.00) Dollars in lawful money of the United States of America, with interest in like money at the rate of $5\frac{1}{2}$ per cent per annum from date until paid.

In case suit or action is instituted to collect this note, or any portion thereof, or interest thereon, said Lamm Lumber Company promises to pay such additional sum as the court may adjudge reasonable attorneys' fees in said suit or action.

LAMM LUMBER COMPANY,
By W. E. LAMM,
President.

Attest:

J. S. KENT,
Its Secretary.

February 23, 1940

Without recourse, pay to the order of The Anglo California National Bank of San Francisco.

CONSOLIDATED SECURITIES
COMPANY,

By H. L. MACHEN,
Vice President.

By I. M. OTTO,
Assistant Secretary.

July 9, 1941

Without recourse, pay to the order of American Trust Company.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO.

By FRED V. VOLLMER,
Vice President.

By R. A. HOLMBERG,
Assistant Secretary.

November 6th, 1932

\$4,125.00

For value received, Lamm Lumber Company, an Oregon corporation, promises to pay, on demand, to Consolidated Securities Company, a California corporation, or order, at The Anglo California National Bank of San Francisco, San Francisco, California, Four Thousand One Hundred and Twenty-five (4,125.00) Dollars, in lawful money of the United States of America, with interest in like money at the rate of $5\frac{1}{2}$ per cent per annum from date until paid.

In case suit or action is instituted to collect this note, or any portion thereof, or interest thereon, said Lamm Lumber Company promises to pay such additional sum as the court may adjudge reasonable attorneys' fees in said suit or action.

LAMM LUMBER COMPANY,
By W. E. LAMM,
President.

Attest:

J. S. KENT,
Its Secretary.

February 23, 1940

Without recourse, pay to the order of The Anglo California National Bank of San Francisco.

CONSOLIDATED SECURITIES
COMPANY,

By H. L. MACHEN,
Vice President.

By I. M. OTTO,
Assistant Secretary.

July 9, 1941

Without recourse, pay to the order of The American Trust Company.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO.

By FRED V. VOLLMER,
Vice President.

By R. A. HOLMBERG,
Assistant Secretary.

March 5th, 1933

\$6,875.00

For value received, Lamm Lumber Company, an Oregon corporation, promises to pay, on demand, to Consolidated Securities Company, a California corporation, or order, at The Anglo California National Bank of San Francisco, San Francisco, California, Six Thousand, Eight Hundred and Seventy-five (6,875.00) Dollars in lawful money of the United States of America, with interest in like money at the rate of $5\frac{1}{2}$ per cent per annum from date until paid.

In case suit or action is instituted to collect this note, or any portion thereof, or interest thereon, said Lamm Lumber Company promises to pay such additional sum as the court may adjudge reasonable attorneys' fees in said suit or action.

LAMM LUMBER COMPANY,

By W. E. LAMM,
President.

Attest:

J. S. KENT,
Its Secretary.

February 23, 1940.

Without recourse, pay to the order of The Anglo California National Bank of San Francisco.

CONSOLIDATED
SECURITIES COMPANY,

By H. L. MACHEN,
Vice President,

By I. M OTTO,
Assistant Secretary.

July 9, 1941

Without recourse, pay to the order of American Trust Company.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO,

By FRED V. VOLLMER,
Vice President,

By R. A. HOLMBERG,
Ass't Sect'y.

May 6th, 1933.

\$4,125.00

For value received, Lamm Lumber Company, an Oregon corporation, promises to pay, on demand, to Consolidated Securities Company, a California corporation, or order, at The Anglo California National Bank of San Francisco, San Francisco, California, Four Thousand One Hundred and Twenty Five (4,125.00) Dollars, in lawful money of the United States of America, with interest in like money at the rate of $5\frac{1}{2}$ per cent per annum from date until paid.

In case suit or action is instituted to collect this note, or any portion thereof, or interest thereon, said Lamm Lumber Company promises to pay such additional sum as the court may adjudge reasonable attorneys' fees in said suit or action.

LAMM LUMBER COMPANY,
By W. E. LAMM,
President.

Attest:

J. S. KENT,
Its Secretary.

February 23, 1940

Without recourse, pay to the order of The Anglo California National Bank of San Francisco.

CONSOLIDATED
SECURITIES COMPANY,
By H. L. MACHEN,
Vice President,
By I. M. OTTO,
Assistant Secretary.

July 9, 1941.

Without recourse, pay to the order of American Trust Company.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO,

By FRED V. VOLLMER,

Vice President,

By R. A. HOLMBERG,

Ass't Sect'y.

September 5th, 1933.

\$6,875.00

For value received, Lamm Lumber Company, an Oregon corporation, promises to pay, on demand, to Consolidated Securities Company, a California corporation, or order, at The Anglo California National Bank of San Francisco, San Francisco, California, Six Thousand Eight Hundred and Seventy Five (6,875.00) Dollars, in lawful money of the United States of America, with interest in like money at the rate of $5\frac{1}{2}$ per cent per annum from date until paid.

In case suit or action is instituted to collect this note, or any portion thereof, or interest thereon, said Lamm Lumber Company promises to pay such additional sum as the court may adjudge reasonable attorneys' fees in said suit or action.

LAMM LUMBER COMPANY,

By W. E. LAMM,

President.

Attest:

JOSEPH S. KENT,

Its Secretary.

February 23, 1940

Without recourse, pay to the order of The Anglo
California National Bank of San Francisco.

CONSOLIDATED
SECURITIES COMPANY,

By H. L. MACHEN,
Vice President,

By I. M. OTTO,
Assistant Secretary.

July 9, 1941.

Without recourse, pay to the order of American
Trust Company.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO,

By FRED V. VOLLMER,
Vice President,

By R. A. HOLMBERG,
Ass't Sect'y.

November 6th, 1933

\$4,125.00

For value received, Lamm Lumber Company, an Oregon corporation, promises to pay, on demand, to Consolidated Securities Company, a California corporation, or order, at The Anglo California National Bank of San Francisco, San Francisco, California, Four Thousand One Hundred and Twenty-five and No One-hundredths (4,125.00) Dollars, in lawful money of the United States of America, with interest in like money at the rate of $5\frac{1}{2}$ per cent per annum from date until paid.

In case suit or action is instituted to collect this note, or any portion thereof, or interest thereon, said Lamm Lumber Company promises to pay such additional sum as the court may adjudge reasonable attorneys' fees in said suit or action.

LAMM LUMBER COMPANY,
By W. E. LAMM,
President.

Attest:

J. S. KENT,
Its Secretary.

February 23, 1940

Without recourse, pay to the order of The Anglo California National Bank of San Francisco.

CONSOLIDATED
SECURITIES COMPANY,
By H. L. MACHEN,
Vice President,
By I. M. OTTO,
Assistant Secretary.

July 9, 1941.

Without recourse, pay to the order of American Trust Company.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO,

By FRED V. VOLLMER,

Vice President,

By R. A. HOLMBERG,

Ass't Sect'y.

March 5th, 1934.

\$6,875.00

For value received, Lamm Lumber Company, an Oregon corporation, promises to pay, on demand, to Consolidated Securities Company, a California corporation, or order, at The Anglo California National Bank of San Francisco, San Francisco, California, Six Thousand Eight Hundred and Seventy-five (6,875.00) Dollars, in lawful money of the United States of America, with interest in like money at the rate of $5\frac{1}{2}$ per cent per annum from date until paid.

In case suit or action is instituted to collect this note, or any portion thereof, or interest thereon, said Lamm Lumber Company promises to pay such additional sum as the court may adjudge reasonable attorney's fees in said suit or action.

LAMM LUMBER COMPANY,

By W. E. LAMM,

President.

Attest:

JOSEPH S. KENT,

Its Secretary.

February 23, 1940.

Without recourse, pay to the order of The Anglo California National Bank of San Francisco.

CONSOLIDATED
SECURITIES COMPANY,

By H. L. MACHEN,
Vice President,

By I. M. OTTO,
Assistant Secretary.

July 9, 1941.

Without recourse, pay to the order of American Trust Company.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO,

By FRED V. VOLLMER,
Vice President,

By R. A. HOLMBERG,
Ass't Sect'y.

May 6, 1934.

\$4,125.00

For value received, Lamm Lumber Company, an Oregon corporation, promises to pay, on demand, to Consolidated Securities Company, a California corporation, or order, at The Anglo California National Bank of San Francisco, San Francisco, California, Four Thousand One Hundred and Twenty-five and No One-Hundredths (4,125.00) Dollars, in lawful money of the United States of America,

with interest in like money at the rate of $5\frac{1}{2}$ per cent per annum from date until paid.

In case suit or action is instituted to collect this note, or any portion thereof, or interest thereon, said Lamm Lumber Company promises to pay such additional sum as the court may adjudge reasonable attorneys' fees in said suit or action.

LAMM LUMBER COMPANY,
By W. E. LAMM,
President.

Attest:

[Seal] JOSEPH S. KENT,
Its Secretary.

February 23, 1940.

Without recourse, pay to the order of The Anglo California National Bank of San Francisco.

CONSOLIDATED
SECURITIES COMPANY,
By H. L. MACHEN,
Vice President.

By I. M. OTTO,
Assistant Secretary.

July 9, 1941.

Without recourse, pay to the order of American Trust Company.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO,

By FRED V. VOLLMER,
Vice President.

[Seal] By R. A. HOLMBERG,
Ass't Sect'y.

September 5th, 1934.

\$6,875.00

For value received, Lamm Lumber Company, an Oregon corporation, promises to pay, on demand, to Consolidated Securities Company, a California corporation, or order, at The Anglo California National Bank of San Francisco, San Francisco, California, Six Thousand Eight Hundred and Seventy-five (6,875.00) Dollars, in lawful money of the United States of America, with interest in like money at the rate of $5\frac{1}{2}$ per cent per annum from date until paid.

In case suit or action is instituted to collect this note, or any portion thereof, or interest thereon, said Lamm Lumber Company promises to pay such additional sum as the court may adjudge reasonable attorneys' fees in said suit or action.

LAMM LUMBER COMPANY,
By W. E. LAMM,
President.

Attest:

JOSEPH S. KENT,
Secretary.

February 23, 1940.

Without recourse, pay to the order of The Anglo California National Bank of San Francisco.

CONSOLIDATED
SECURITIES COMPANY,
By H. L. MACHEN,
Vice President.
By I. M. OTTO,
Assistant Secretary.

July 9, 1941.

Without recourse, pay to the order of American Trust Company.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO,

By FRED V. VOLLMER,
Vice President.

By R. A. HOLMBERG,
Ass't Sect'y.

This Agreement, made this 24th day of December, 1936, by and between Lamm Lumber Company, a corporation organized and existing under the laws of the State of Oregon, first party, hereinafter called "Mortgagor," and Consolidated Securities Company, a corporation organized and existing under the laws of the State of California, second party, hereinafter called "Mortgagee,"

Recitals:

Mortgagor is indebted to Mortgagee, as evidenced by various promissory notes executed by Mortgagor to Mortgagee, and secured by two (2) mortgages upon that certain railroad extending from Chinchalo, Oregon, in an easterly direction 32.37 miles to the South line of Section 7, Township 32 South, Range 12 East, at a point 467' East and the section corner common to Sections 12, 13, 17 and 18, and situated partly in the County of Klamath and partly

in the County of Lake, State of Oregon, and known as the "Yamsey Mountain Railroad." One of said mortgages is dated May 6th, 1930, and was recorded on June 16th, 1930, in Volume 46 of Mortgages, Page 553 in the records of said County of Klamath; also recorded on May 31st, 1930, at Page 615, Book 17, Records of Chattel Mortgages of said County of Lake. The other morgage is dated September 5th, 1930, and was recorded on September 12th, 1930, in Volume 47 of Mortgages, at Page 267, Records of said County of Klamath, and also recorded on September 22nd, 1930, at Page 85 in Book 23, Record of Mortgages of said County of Lake.

The principal sum of said indebtedness is evidenced by two (2) promissory notes, one dated May 6th, 1930, for the sum of \$150,000, and the other dated September 5th, 1930, for the sum of \$250,000, and the unpaid interest which has accrued and will accrue on the principal sum of \$400,000, as of December 31st, 1936, amounts to the sum of \$127,939.20.

Agreement:

Now, Therefore, in consideration of the mutual and dependent promises herein contained, and notwithstanding anything to the contrary contained in said notes and said mortgages, it is mutually agreed by and between the parties hereto as follows, to wit:

1. Simple interest at the rate of five and one-half ($5\frac{1}{2}$) per cent per annum shall be accrued from the sixth day of November, 1931, on the

\$150,000 note and from the fifth day of September, 1931, on the \$250,000 note to and including the thirtieth day of June, 1933, on both notes, and the interest so accrued shall be added to the principal. Effective July 1st, 1933, the rate of interest on the principal of said notes as so increased shall be and is hereby reduced from $5\frac{1}{2}\%$ per annum to three (3) per cent per annum, and simple interest shall accrue after June 30th, 1933, at the rate of three (3) per cent per annum until January 1st, 1938. The interest thus accrued shall be added to the principal, producing a new principal sum, as of January 1st, 1938, of the sum of \$497,845.00. The foregoing adjustment of interest results in a decrease of interest accruals in the sum of \$43,253.24, which shall be and is hereby cancelled and the Mortgagor is hereby released from all obligations to pay the same. Commencing January 1st, 1938, the new principal sum of said indebtedness shall bear interest at the rate of three (3) per cent per annum until fully paid.

2. Mortgagor covenants and agrees to pay to Mortgagee commencing January 1st, 1938, the sum of Five (5) Dollars, lawful money of the United States, for each and every carload of logs transported over the Yamsey Mountain Railroad, and the sum of Ten (10) Dollars, lawful money of the United States, for each carload of manufactured forest products transported over said Yamsey Mountain Railroad. Such payments shall be made monthly on the tenth day of each calendar month for all logs and manufactured products transported during the preceding calendar month. The sums

of money so paid shall be applied (first) to the payment of interest at the rate of three (3) per cent per annum on the adjusted principal of \$497,845.00, or the unpaid balance thereof as reduced by subsequent payments, and (second) the remainder of such payments shall be applied to reduction of said adjusted principal. Mortgagor agrees to furnish or cause to be furnished to Mortgagee, or its nominee, on or before the tenth day of each month, a true statement of the number of carloads of logs and manufactured forest products transported over said Yamsey Mountain Railroad, during the preceding calendar month, and further covenants and agrees that duly authorized representatives of Mortgagee shall have the right, at all reasonable times, to inspect and examine the books, records and accounts of Mortgagor, with respect to transportation of logs and manufactured forest products over said Yamsey Mountain Railroad for the purpose of verifying each and every such statement. Mortgagor guarantees a minimum payment of \$15,000 for each calendar year during the period commencing January 1st, 1938, to December 31st, 1941, and a minimum payment of \$35,000 for each calendar year commencing January 1st, 1942. In the event that the sum of the monthly payments at the rates herein provided for, shall not equal the minimum payment required to be made at the end of each calendar year, the Mortgagor agrees to pay to the Mortgagee within thirty (30) days, after the expiration of each such calendar yearly period, an additional sum which to-

gether with the monthly payments theretofore paid for such yearly period to Mortgagee for logs and manufactured forest products transported over said Yamsey Mountain Railroad, shall equal the minimum payment guaranteed by the Mortgagor for such calendar year. Payments herein provided for shall continue until the entire principal indebtedness, together with the interest accruing thereon, shall be paid in full.

3. Until the principal amount, together with the interest accruing thereon, has been fully paid Mortgagor covenants and agrees that it will not sell said Yamsey Mountain Railroad, or any interest therein, or lease said railroad and that it will not permit common carrier operations over said railroad without the consent of the Mortgagee.

4. All extensions and/or branches of said railroad and appurtenances, whether located upon the lands described in said mortgages or elsewhere, shall fall under and be subject to said mortgages, and all of the terms, covenants and conditions thereof and this agreement. Nothing herein shall be construed as a limitation of the after acquired properties clauses contained in said mortgages, nor of the description of the properties covered by said mortgages.

5. Except as herein otherwise provided, all of the terms, covenants, conditions and stipulations contained in the notes evidencing said indebtedness and in the said mortgages securing said indebtedness, shall be and remain in full force and effect unmodified and unchanged by this agreement.

In Witness Whereof, the parties hereto have executed this agreement, in duplicate, the day and year first hereinabove written.

LAMM LUMBER COMPANY,
By W. E. LAMM,
President.

Attest:

J. S. KENT,
Secretary.

CONSOLIDATED SECURI-
TIES COMPANY,
By H. L. MACHEN,
Vice President.

Attest:

I. M. OTTO,
Asst. Secretary.

On this 24th day of December, 1936, appeared before me, a Notary Public for and in the State of Oregon, County of Klamath, W. E. Lamm, personally known to me to be the President of the Lamm Lumber Company, and acknowledged that he executed the within instrument.

[Seal] By E. L. PUTNAM,
Notary Public.

My commission expires June 20, 1939.

State of California,
City and County of San Francisco—ss.

On this 29th day of December, in the year One

Thousand Nine Hundred and Thirty-six before me, Mary J. Creech, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared H. L. Machen and I. M. Otto known to me to be the Vice President and Assistant Secretary of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] MARY J. CREECH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires May 25, 1937.

State of California,
City and County of San Francisco—ss.

On the 28th day of December, in the year One Thousand Nine Hundred and Thirty-six, before me, Eleanor J. Smith, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared J. S. Kent, known to me to be the Secretary of Lamm Lumber Company, the Corporation described in and that executed the

within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, in the City and County of San Francisco, State of California, the day and year in this Certificate first above written.

[Seal] ELEANOR J. SMITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires December 29, 1938.

EXHIBIT 2-B

Instructions and Agreement

American Trust Company
464 California Street
San Francisco, California

Gentlemen:

Lamm Lumber Company, an Oregon corporation, has an obligation, the unpaid balance of which was Four Hundred Eleven Thousand Two Hundred Sixty-four and 99/100 Dollars (\$411,264.99) on June 12, 1941, bearing interest at the rate of 3% per annum from that date, and which is evidenced by the following:

1. Notes of Lamm Lumber Company payable to Consolidated Securities Company, endorsed without recourse by Consolidated Securities Com-

pany to the Anglo-California National Bank of San Francisco, and endorsed without recourse by the Anglo-California National Bank of San Francisco to American Trust Company:

Date of Note	Face Amount	Int. Rate	Maturity
5/6/1932	\$ 4,125.00	5½%	Demand
11/6/1932	4,125.00	5½%	Demand
5/6/1933	4,125.00	5½%	Demand
11/6/1933	4,125.00	5½%	Demand
5/6/1934	4,125.00	5½%	Demand
3/5/1932	6,875.00	5½%	Demand
9/5/1932	6,875.00	5½%	Demand
3/5/1933	6,875.00	5½%	Demand
9/5/1933	6,875.00	5½%	Demand
3/5/1934	6,875.00	5½%	Demand
9/5/1934	6,875.00	5½%	Demand
* 5/6/1930	150,000.00	5½%	\$50,000 on 5/1/34 \$50,000 on 5/1/35 \$50,000 on 5/1/36
** 9/5/1930	250,000.00	5½%	\$50,000 on each May 1st commencing May 1st, 1937

Under terms of agreement (hereinafter referred to as 4), the interest rate on notes * and ** above is reduced to 3%, effective July 1st, 1938, after certain adjustments with respect to interest accrued prior thereto; also modifies principal payments with respect to said notes.

2. Mortgage Indenture for One Hundred Fifty Thousand Dollars (\$150,000.00) dated May 6, 1930, between Lamm Lumber Company, an Oregon corporation as "Mortgagor" and Consolidated Securities Company, a California corporation as "Mortgagee," recorded May 31, 1930, on Page 615 in Book 17, Records of Chattel Mortgages in Lake County, Oregon, and recorded June 16, 1930, in Volume 46 of Mortgages, Page 553 in Klamath County, Oregon.

3. Mortgage Indenture for Two Hundred Fifty Thousand Dollars (\$250,000.00), dated September 5, 1930, between Lamm Lumber Company, an Oregon corporation, as "Mortgagor" and Consolidated Securities Company, a California corporation, as "Mortgagee" recorded September 12, 1930, in Volume 47 of Mortgages, Page 267 in Klamath County, Oregon, and recorded September 22, 1930, on Page 85 in Book 23, Records of Mortgages in Lake County, Oregon.

4. Agreement dated December 24, 1936, between Lamm Lumber Company, an Oregon corporation as "Mortgagor" and Consolidated Securities Company, a California corporation as "Mortgagee," recorded January 4, 1937, in Volume 58 of Mortgages, Page 70, Klamath County, Oregon, and recorded January 8, 1937, on Page 186 in Book 26, Records of Realty Mortgages, Lake County, Oregon.

The undersigned, joint owners of said obligation in the fractional interests indicated below have caused the above described notes to be endorsed and delivered to you, and have caused The Anglo-California National Bank of San Francisco to execute and deliver to you an "Assignment of Mortgages" dated July 9, 1941, to be held by you as our Agent and subject to the provisions of this Agreement. The undersigned have caused an unrecorded agreement covering "Option Rights" dated May 6, 1930, between Lamm Lumber Company and Consolidated Securities Company to be assigned to you likewise

to be held by you as our Agent and subject to the provisions of this Agreement.

You shall cause to be recorded in Lake and Klamath Counties, Oregon, the "Assignment of Mortgages" dated July 9, 1941, hereinbefore referred to.

You shall hold without causing recordation thereof "Agreements Covering Option Rights" dated May 6, 1930, and the assignment thereof hereinbefore referred to.

You are to receive for the account of the undersigned and as their Agent such payments on account of interest and principal as may be made to you from time to time by Lamm Lumber Company. Out of the first payments received by you on account of principal, you are to pay H. Edwin Nowell or his order the sum of \$676.05. On or within a reasonable time after the 10th day of each September, December, March and June, you are to remit to each of the undersigned a check for his share of the interest payments and separate check for his share of the principal payments, less your charges.

You shall have no duty to take any steps to enforce the collection of said obligation, nor to prevent it or any part of it or any of the notes, mortgages, agreements, or other documents evidencing or modifying it, from outlawing, nor to take any action of any other kind other than as herein specifically set forth, except upon the written instructions of the persons who, at the time, shall be the owners in the aggregate of 75% or

more of the entire interest in said obligation, and after the furnishing to you of such indemnity as you shall require, any and all action taken by you pursuant to such instructions shall be your complete acquittance relative thereto.

You shall not be responsible or liable in any manner whatever for the sufficiency, genuineness, or validity of said obligation, or the Mortgages securing the same, or the agreements or assignments, or other documents or instruments, affecting them or it, or with the respect to their form or execution. You shall be fully protected in acting upon any notice, request, waiver, consent, receipt or other paper or document believed by you to be genuine and to be signed by the proper party or parties. You may advise with legal counsel in the event of any dispute or question as to the construction of these instructions, or your duties thereunder, and you shall incur no liability and shall be fully protected in acting in accordance with the opinion and instructions of such counsel.

In the event of any disagreement between the undersigned or their successors in interest, or any other person or persons, resulting in adverse claims being made in connection with or for any papers, money, or property involved herein, or affected hereby, you shall be entitled at your option to refuse to comply with any such claim or demand so long as such disagreement shall continue, and in so doing you shall not be or become liable to any of the undersigned or any of them for your failure or refusal to comply with such conflicting or ad-

verse demands, and you shall be entitled to continue so to refrain and refuse to act until:

1. The rights of the adverse claimants have been finally adjudicated in the Court assuming and having jurisdiction of the parties, and the money, papers and property involved herein are affected hereby; and/or

2. All differences shall have been adjusted by agreement and you shall have been notified thereof in writing, signed by all of the persons interested.

3. In the event of such disagreement, you in your discretion, may file a suit in interpleader for the purpose of having the respective rights of the claimants adjudicated, and deposit with the Court all documents and property held hereunder, and the undersigned agree to pay all costs and counsel fees incurred by you in such action, and said costs and fees may be included in the judgment in any other action.

For your ordinary services hereunder, you shall receive, and shall be entitled to deduct from principal payments, or if they are insufficient, then from interest payments, compensation as follows:

\$500 as an acceptance fee;

Reimbursement for out-of-pocket expenses incurred by you;

An annual fee of \$100.00 plus 1/10 of 1%

of the unpaid balance of said obligation at the beginning of each year;

\$250.00 as a closing fee.

Any fees paid you by Lamm Lumber Company shall be credited against the foregoing.

For any extraordinary services rendered by you hereunder, you shall be entitled to reasonable additional compensation. Your charges for any services in connection with the individual interests of any of the undersigned or their successors in interest shall be charged against them individually.

The undersigned agree jointly and severally to indemnify and hold you harmless for all taxes, expenses, costs, demands, claims and liabilities of every kind and character arising out of or in connection with these instructions and the property held hereunder.

All rights and obligations of the undersigned hereunder shall inure to and be binding on their successors in interest which term shall include their heirs, assigns and personal representatives.

You shall not be bound to take notice of any change in the ownerships of the interests of any of the undersigned unless and until there shall have been filed with you such documentary evidence as you shall consider necessary to establish such change.

These instructions may be terminated at any time by the then holders of 100% of the interest in said obligation, but not otherwise. In such event, after the payment or provisions for your compensa-

tion and other charges, the property then held hereunder shall be returned to the undersigned, or their successors in interest, or their order.

When there shall have been paid to you by or on behalf of Lamm Lumber Company in lawful money of the United States sums totaling \$411,-264.99, plus simple interest on the decreasing balances at the rate of 3% per annum, you are authorized to cancel all of the notes held by you hereunder, and to return them to Lamm Lumber Company and to execute and deliver to it any and all releases, satisfactions, and other instruments necessary or desirable to evidence the extinguishment of its said obligation.

These instructions may be signed in any number of counterparts with the same effect as though they were one and the same document. They shall not become effective for any purpose unless and until they have been signed by the owners of 100% of the interest in said obligation.

Dated as of July 15, 1941.

.....

Percentage Interest %.

Address:

.....

We acknowledge receipt of the signed original hereof and of the documents referred to herein, and agree to carry out the foregoing instructions.

Dated:, 1941.

AMERICAN TRUST
COMPANY.

EXHIBIT 3-C

American Trust Company

Agency Accounts, Mrs. Edith Lamm, et al., for collection of interest at 3% and the Principal of an obligation of Lamm Lumber Company of Modoc Point, Oregon, as from July 1, 1941, in a principal sum of \$411,264.99.

Names and Addresses	Participation by	Percentage of the Total Interest and Principal Belonging to Each
	Each of a Total Sum of \$205,632.50	
Mrs. Edith Lamm	\$25,000	12.157611
3218-3rd Ave., San Diego, Calif.		
Miss Edith Lamm	25,000	12.157611
3218-3rd Ave., San Diego, Calif.		
Ethel Fisher	25,000	12.157611
La Cumbre Road, Santa Barbara, Calif.		
W. E. Elliott	25,000	12.157611
667 Carondelet St., Los Angeles, Calif.		
Elsa Natalie	20,000	9.726089
2095 E. Orange Grove Ave., Pasadena, Calif.		
W. E. Lamm	16,500	8.024023
Modoc Point, Oregon		
R. G. Watt	15,000	7.294567
Prineville, Oregon		
Alice McCourt Lamm.....	12,000	5.835653
Trustee for Winifred Carol Lamm		
Modoc Point, Oregon		
Chas. C. Elliott	8,500	4.133588
Rural Box 905, Rt. 1, Fontana, Calif.		
Alice McCourt Lamm	8,000	3.890436
Modoc Point, Oregon		
E. D. and Beth L. Elliott, J. T... 7,000		3.404131
3218-3rd Ave., San Diego, Calif.		
Joseph S. Kent	5,000	2.431522
333 Montgomery St., San Francisco, Calif.		
H. Edwin Nowell	2,632.50	1.280197
601 Crocker Building, San Francisco, Calif.		
Everitt A. and Lorraine		
M. Hill, J.T.	2,000	.972609
Modoc Point, Oregon		

Names and Addresses	Participation by	Percentage of the
	Each of a Total Sum of \$205,632.50	Total Interest and Principal Belonging to Each
C. E. and Manila		
McClung Matkin, J.T.	2,000	.972609
Modoc Point, Oregon		
S. E. and Ann J. Rife, J.T.....	2,000	.972609
Modoc Point, Oregon		
W. A. & Edna S. Spangler, J.T.	2,000	.972609
Modoc Point, Oregon		
S. W. & Alta J. Egeline, J.T.....	2,000	.972609
2202 Oregon Avenue, Klamath Falls, Ore.		
A. G. Hammond	1,000	.486305
5915 Ross Street, Oakland, Calif.		
Total.....	<u>\$205,632.50</u>	<u>100.000000</u>

Correct Final List

EXHIBIT 4-D

Lamm Lumber Company
Manufacturers

Klamath Quality Ponderosa Pine
Modoc Point, Oregon

August 26, 1941

American Trust Co.,
464 California St.,
San Francisco, Calif.

Attention Mr. Brown, Trust Dept.

Dear Mr. Brown:

Relative to our R.R. mortgage which you hold in trust for the new owners we wish to suggest that we think details should correspond to practice heretofore established.

We have been paying the Anglo bank \$250.00 per year service charge, payable in arrears for each six months. Our company should therefore pay the

same in the future and the participants in ownership should pay the balance. We have no objection to paying six months in advance if you prefer. Please bill us for these charges.

The former holders of the mortgage figured exact interest on the basis of 365 days per year. We notice that your company is computing interest bank style on 360 days. We think you should change to the 365 day basis to conform with prior practice.

May we hear from you on these details?

Very truly yours,

LAMM LUMBER COMPANY.

By W. E. LAMM.

WEL/hs

cc H. E. Nowell.

Filed T.C.U.S. November 15, 1949.

The Tax Court of the United States

Docket Nos. 21724, 21725, 21726, 22126, 22127,
22128, 22129, 22130, 22131, 22132, 22133, 22635,
22636, 22637 and 22638

ALICE McCOURT LAMM, et al.,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Tuesday, November 15, 1949

Met, pursuant to notice, at 9:30 o'clock a.m.

Before: Hon. Marion J. Harron,
Judge.

Appearances:

HARRY R. HORROW, ESQ., and
FRANCIS N. MARSHALL, ESQ.,
Appearing on Behalf of Petitioners.

T. M. MATHER, ESQ.,
(Hon. Charles Oliphant, Chief Counsel,
Bureau of Internal Revenue)
Appearing for the Respondent.

PROCEEDINGS

The Clerk: Dockets 21724, 21725, 21726, and
22126, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37 and 38,
Alice McCourt Lamm, et al.

Will you state your appearances, please?

Mr. Horrow: Harry R. Horrow, and Francis M. Marshall, for the Petitioners.

Mr. Mather: T. M. Mather, for the Respondent.

The Court: Mr. Horrow, will you proceed, please?

Mr. Horrow: There is a single issue involved in each of these proceedings. I move that they be consolidated for trial and opinion.

The Court: Motion is granted.

Mr. Horrow: I now file a joint motion for consolidation. If your Honor please, the issue involves Section 17F of the Internal Revenue Code. The question presented is whether gains realized by each of the Petitioners in these cases are to be treated as capital gains as reported by the Petitioners in their returns for the year 1943 or whether they are to be treated as ordinary income as determined by the Commissioner. That question involves the provisions of Section 17F, which provides that corporate indebtedness in registered form gives rise to a gain resulting from an exchange. The question here is whether certain indebtedness of the Lamm Lumber Company, which was retired in 1943 and gave [3*] rise to gains for each of the petitioners in that year is corporate indebtedness in registered form within the meaning of that section.

The parties have entered into a stipulation of facts which I wish to file at this time.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: The stipulation of facts is received and made part of the record.

Mr. Horrow: I would like to review briefly the stipulation, your Honor.

The Court: There are four exhibits attached to the stipulation, Exhibit 1-A to 4-B. That is all, is that correct?

Mr. Horrow: That is correct, your Honor.

The Court: And those exhibits are received in evidence.

Mr. Horrow: Yes.

(The documents referred to were marked and received in evidence as Petitioner's Exhibits Nos. 1-A to 4-B.)

Mr. Horrow: The first four paragraphs of the stipulation cover formal matters with respect to the amounts of the deficiencies in controversy.

Paragraph 5 describes the origin of the indebtedness in question here. The indebtedness consisted of promissory notes which were issued by the Lamm Lumber Company, a corporation. [4] Copies of each of the notes is attached to the stipulation and marked Exhibit 1-A. The amount of the indebtedness owing as of July 1, 1941, at which time the Petitioners acquired interest in these notes, is stipulated and Paragraph 6 describes the method whereby the Petitioners acquired their interest in the notes. The notes were owned by the Southern Pacific Land Company and it offered to sell to the Petitioners these notes at 50 per cent of the balance of the principal of the loan. The purchase was made pursuant to said offer and Paragraph 7 de-

scribes the execution of a written agreement that was entered into with the American Trust Company whereby these notes were delivered to the American Trust Company to be held in conformance with that agreement.

Contemporaneously with the delivery of this agreement there was delivered to the American Trust Company a list of the names, addresses, amounts invested, and percentage interest of each of the Petitioners herein, and the other individuals who are not parties to this proceeding who owned interest in the notes. A copy of that list is marked Exhibit 3 and attached to the stipulation.

It is our contention that by virtue of this agreement, which is in evidence as Exhibit 2-B, and the list which is in evidence as Exhibit 3-C, together with the procedure followed in connection with these notes, that the notes became registered within the meaning of Section 17F and had that [5] status at the time of retirement in 1943. The subsequent paragraphs of the stipulation cover the procedure covered in making payments to the owners of interest in the notes and the stipulations covering that procedure will be amplified by our oral testimony on the part of an officer of the American Trust Company. There is no dispute as to the amount of the gains, your Honor. The sole question is whether the gains resulted from retirement of registered notes.

Mr. Mather: If your Honor please, that is the only question in the case. It is the position of the Respondent that the notes were not in registered form or obviously they weren't notes that had cou-

pons attached and, accordingly, they don't come within the provisions of 17F.

The Court: Does your stipulation of facts give the facts relating to the circumstances under which the notes were originally issued?

Mr. Horrow: Your Honor, they do not, because there is no contention here with respect to whether the notes were registered at the time they were originally issued. In fact, we concede that they were not registered at the time they were originally issued and we have simply stated in the stipulation the fact of issuance and the amount of the original indebtedness evidenced by the notes.

The Court: The notes were issued by the Lamm Lumber Company, is that correct? [6]

Mr. Horrow: Correct, your Honor.

The Court: Where is that located?

Mr. Horrow: Lamm Lumber Company is an Oregon corporation located at Modoc, Oregon.

The Court: Originally there were two notes, one for \$150,000 and one for \$250,000. They were made payable to the order of Consolidated Securities Company and were secured by a mortgage on a railroad owned by the Lamm Lumber Company. Now, are we to understand that the Consolidated Securities Company held those two notes itself?

Mr. Horrow: Now, we have stipulated that the Southern Pacific Land Company was at all times prior to July 1, 1941, beneficial owner of the notes, mortgages, and certain operations.

The Court: Well, the notes, then, were held under a trust agreement?

Mr. Horrow: That is correct.

The Court: Well, let me see. That transaction would probably have been something like this: The notes, the mortgage on the railroad was covered by a mortgage in trust indenture, probably, is that right?

Mr. Horrow: There was a deed of trust securing the notes which covered various properties of the Lamm Lumber Company, principally timber. The mortgage is not part of the record, mortgage and deed of trust.

The Court: The terms for the payment of the notes [7] would be set forth in that trust indenture, wouldn't they?

Mr. Horrow: No, your Honor. The terms and conditions covering payments of the notes were in the notes as originally issued and these terms were later modified in 1936. A copy of the modifying agreement is a part of Exhibit 1-A.

The Court: But I wanted to ascertain whether the original notes were ever sold to any other owners than the Southern Pacific Land Company?

Mr. Horrow: No, your Honor. The stipulation shows that the notes were originally issued with the Southern Pacific Land Company as the beneficial owner, although they were payable to Consolidated Securities Company.

The Court: As the trustee?

Mr. Horrow: The Consolidated Securities Company was simply a nominee or agent of the Southern Pacific Land Company.

The Court: So that the first time that interests

were sold in these notes was when the Petitioners in this proceeding and some others who are listed on one of the exhibits purchased undivided interest in the notes; is that correct?

Mr. Horrow: That is correct. There were 19 individuals who acquired interest in the notes in 1941, of whom 15 of those individuals are Petitioners in these proceedings.

The Court: Now, the modification of the original agreement, you say, is introduced in evidence in this case as Exhibit 2-B, is that correct? [8]

Mr. Horrow: No, your Honor. It is a part of Exhibit 1-A and appears on Pages 44 to 48 inclusive of the Stipulation.

The Court: I wonder if you would kindly describe the terms of that agreement briefly so that when the testimony of your witnesses is given it will be better understood, perhaps.

Mr. Horrow: The agreement changed the rate of interest which was to be effective, and for our purposes it is sufficient to point out that the rate was to be three per cent per annum from February 1, 1938, until payment. The obligor under the notes was the Lamm Lumber Company and was obliged to pay \$10 for each carload of lumber transported over its railroad, \$5 for each carload of logs transported over the railroad, and the agreement covered the manner of applying the sum so paid by the Lamm Lumber Company. The agreement further provided that all of the terms and conditions of the notes evidencing the indebtedness were to remain in

full force and effect except as modified by this agreement.

The Court: The obligor had defaulted to some extent, is that correct?

Mr. Horrow: That is correct, your Honor.

The Court: What was the nature of the default?

Mr. Horrow: Well, simply an inability to meet the payments provided for in the notes.

The Court: Interest or also principal? [9]

Mr. Horrow: There was a default both as to principal and interest.

The Court: Well, then, what was the total indebtedness that was covered by the agreement which appears on Page 44?

Mr. Horrow: Paragraph 5 of the Stipulation shows that the principal of the indebtedness as of January 1, 1938, was \$497,845.

The Court: What page is that on?

Mr. Horrow: Page 11 of the Stipulation. I might say that the agreement in 1936 which I referred refunded the accrued and unpaid interest due January 1, 1938.

The Court: As I understand what I am reading on Page 44 there was unpaid and accrued interest in the amount of \$127,939.20, is that right? The original amount of the notes is \$400,000?

Mr. Horrow: That is correct. Those recitals appear——

The Court: Well, has the principal of the notes been reduced at all?

Mr. Horrow: I don't believe the principal has been reduced at all.

The Court: Now, in general, is this the kind of situation that existed: There were defaults on the notes and agreement was entered into with the holder of the notes to reduce the amount of the interest to be paid after January 1, [10] 1941. Is that the date?

Mr. Horrow: January 1, 1938.

The Court: January 1, 1938. Now, this question that might be of some importance. Did the parties agree that the principal amount of the indebtedness should be increased to include an accrued interest up to the time of the supplemental agreement?

Mr. Horrow: That was agreed, your Honor. The principal was restated as of January 1, 1938.

The Court: All right. Now, when did the Petitioners in this proceeding acquire an interest in these notes?

Mr. Horrow: On or about July 1, 1941.

The Court: July 1, 1941. Do you call it a re-funding agreement under which the interest was added to the principal?

Mr. Horrow: Well, that could be one description of the agreement. Actually, the agreement of 1936 was designed to take care of defaults which had already occurred and restate the indebtedness and provide for the satisfaction of that indebtedness, too. There were certain changes made in the manner of payment.

The Court: We can refer to it, then, as the 1936 agreement.

Now, between 1936 and 1941 did the Southern Pacific Land Company continue to be the beneficial owner of the notes?

Mr. Horrow: Yes, your Honor. It is so stipulated. [11]

The Court: The 1936 agreement was with the Consolidated Securities Company which was a nominee of the Southern Pacific Land Company, so for all practical purposes, no doubt the 1936 agreement was with the Southern Pacific Land Company?

Mr. Horrow: That is correct.

The Court: Then who offered the interest in the notes, the Consolidated Securities Company to these Petitioners and others?

Mr. Horrow: The stipulation on Page 12 shows that the offer was actually made by the Southern Pacific Land Company, the parent of Southern Pacific Land Company on behalf of Southern Pacific Land Company.

The Court: I will try to come to the end of these questions as soon as possible, but I am not quite sure yet what the relationship of these taxpayers is to the debtor. Now, of course, the Lamm Lumber Company was the obligor under the notes. A holder of the notes sold interest in the notes at a discount, isn't that true?

Mr. Horrow: That is correct.

The Court: To the Petitioners in this proceeding and others. Then the Southern Pacific Companies, whatever they were, their names are not

too important at this moment, they were out of the picture, is that right?

Mr. Horrow: After the offer was accepted and the Southern Pacific Land Company was paid the purchase price of these [12] notes, the Southern Pacific Land Company had no further interest in this matter.

The Court: And they presumably took a loss, did they, on the transaction?

Mr. Horrow: I have no knowledge of how the Southern Pacific Land Company accounted for this transaction.

The Court: I don't mean from a tax standpoint, but from a fact standpoint.

Mr. Horrow: I have no——

The Court: Did they pay the face amount of the notes to Lamm Lumber Company originally?

Mr. Horrow: I have no knowledge as to whether the loss was considered as having resulted in prior years or whether through a write-down of the indebtedness or whether Southern Pacific Land Company considered that the company sustained a loss at the time the notes were sold.

The Court: But do you understand that there was a payment originally in the face amount of these notes to the Lamm Lumber Company by the vendee, whoever it was, Consolidated Company or Southern Pacific Land Company? Is that your understanding?

Mr. Horrow: Yes, the notes evidenced advances that were made in the face amount of the notes.

The Court: Now, then, you have stipulated what

the group of second purchasers paid for interest in these notes, [13] and could you give me that just for purposes of my effort to arrive at a quick understanding of the facts?

Mr. Horrow: Well, we have stipulated that the Petitioners, together with the other individuals who purchased interest in these notes, became aware of the willingness of the Southern Pacific Land Company to sell these notes at a discount and in order to avail themselves of the investment opportunity thus presented they offered to purchase these notes at 50 per cent of the face amount of the indebtedness.

The Court: Was that done in one transaction? Was there a lump sum payment?

Mr. Horrow: That was done in one transaction. The stipulation shows that the individuals purchased undivided fractional interest in these notes for the total sum of \$206,388.55, which was one-half of the principal indebtedness of the notes as of July 1, 1941.

The Court: Well, I believe I have one more question, Mr. Horrow. I don't understand something. The face amount of the notes was originally \$400,000. There were defaults and some accruals of interest. Then there was an agreement, the 1936 agreement, under which the holders of the notes and the debtor on the notes agreed to a reduction in the debtor's obligation upon all of the indebtedness and that then brought the indebtedness down to a certain amount as of January 1, 1936. [14]

Mr. Horrow: There was no reduction in the indebtedness, your Honor.

The Court: There was not?

Mr. Horrow: Restatement of the indebtedness and a reduction of the interest payable.

The Court: All right. The accruals of interest, or whatever else was in default, I presume, was added to the principal.

Mr. Horrow: That is correct.

The Court: This interest was to be paid at a reduced rate upon an increased amount of principal. Would that be right?

Mr. Horrow: That is correct.

The Court: Then there was an indebtedness under an agreement which is called the 1936 agreement. Now, that agreement remained unchanged, isn't that correct, for purposes of these taxpayers?

Mr. Horrow: Paragraph 11 of the Stipulation shows that the indebtedness was reduced from 1938 to 1941 to \$411,264.99.

The Court: Paragraph 11?

Mr. Horrow: Page 11.

The Court: Page 11 of the Stipulation?

Mr. Horrow: Of the Stipulation.

The Court: It was reduced by payments or was reduced [15] by agreement.

Mr. Horrow: Reduced by payments on the debt in accordance with the agreement.

The Court: What is that figure again?

Mr. Horrow: \$411,264.99. That appears at the

bottom of Page 11 of the Stipulation.

The Court: I have it now. That is the indebtedness of the Lamm Lumber Company which these Petitioners and a few others purchased for \$206,388, is that right?

Mr. Horrow: The Lamm Lumber Company was not a party to this purchase.

The Court: If, in asking you any questions at this time, I appear to get into an area that is part of the issue to be decided, please don't be disturbed about that. I am just asking for information now. I am not asking you to agree to anything.

What I am trying to get at is this: I will ask the question again—the Petitioners in this proceeding purchased undivided interest in these notes at a discount from the Southern Pacific Company. The principal amount of these notes as modified by the 1936 agreement would represent the obligations of the Lamm Lumber Company.

Mr. Horrow: That is correct.

The Court: The Lamm Lumber Company remains the obligor but the holder of the notes changes from the Southern [16] Pacific Company to these new people.

Mr. Horrow: That is correct.

The Court: If the Lamm Lumber Company should be able to meet the full amount of its indebtedness, then this second group of note-holders would expect to receive more than they paid for their interest in these notes. That is what I am trying to get at.

Mr. Horrow: That is correct.

The Court: That is enough to give me an understanding of the facts so that I will understand any testimony that is given.

Is there anything further that you would like to point out at this time?

Mr. Horrow: No, you Honor. I think we have sufficient to——

The Court: Mr. Mather, is there anything further?

Mr. Mather: Nothing except the tax arises by the Lamm Lumber Company paying off these notes in the amount of the indebtedness of \$411,264.99, which it cost these Petitioners half of that amount.

The Court: Then that is the final fact I didn't come to. The notes, then, were paid by the Lamm Lumber Company in what year, 1943?

Mr. Horrow: The notes were retired by payment in full in 1943. [17]

The Court: '43. Will your testimony show how the American Trust Company came into the picture? What its function was and all of that, or is that covered by the Stipulation?

Mr. Horrow: That is covered in part by the Stipulation, but the testimony will amplify that.

The Court: How many witnesses will you have?

Mr. Horrow: We have one witness.

The Court: Then I expect I should ask a little information—ask for a little enlightenment now on the point of function of the American Trust Company. That seems to be covered in Paragraph 7 of the Stipulation, is that right?

Mr. Horrow: This is covered in Paragraphs 7 to 9 of the Stipulation.

The Court: In just a brief statement, what was the American Trust Company to do?

Mr. Horrow: The American Trust Company maintained a record of ownership of interest in these notes. It received the payments of principal and interest made by the Lamm Lumber Company and paid these amounts to the owners of interest in these notes.

The Court: It was a collection agent, collection and paying agent, is that right?

Mr. Horrow: Your Honor, I might say that that involves in part the issue in this case. The exact nature of [18] the American Trust Company's function, I think, is in controversy here. It is our position that the American Trust Company without regard to what other capacity it acted in, acted as a registrar and maintained a registrar of ownership so that the indebtedness was in registered form at the time of retirement.

The Court: Exhibit 2-B is instructions and agreement. Is it a letter addressed to the American Trust Company by somebody?

Mr. Horrow: It is an agreement entered into between the American Trust Company and each of the individuals who acquired an undivided interest in the notes.

The Court: 2-B is—Exhibit 2-B is on Page 50.

Mr. Horrow: Exhibit 2-B is the agreement I had referred to.

The Court: Now, that exhibit is a copy, an un-

executed copy of either an agreement or letter of instruction. Whatever it is we will no doubt learn later, but it is in the form of a letter from the American Trust Company to somebody. The salutation is "Gentlemen." Now, to whom—is that supposed to be addressed to someone who has an interest in these notes? I wonder if we are looking at the same thing?

Mr. Horrow: Exhibit 2-B is in the form of a letter agreement.

The Court: Is in the form of an—I didn't hear you. [19]

Mr. Horrow: Of a letter agreement.

The Court: Of a letter agreement.

Mr. Horrow: The agreement was executed, as we have shown in the Stipulation, by each of the owners of the notes separately in that each individual signed a counterpart of the agreement, a form of which is a part of the Stipulation. The American Trust Company executed each of the counterparts.

The Court: Now, in Exhibit 2-B there are 12 notes listed. That is a matter of fact that I didn't understand at first. According to the Stipulation, as I was able to understand, reading it over quickly, I thought there were just two notes in the face amount of \$150,000 and \$250,000 originally issued by the Lamm Lumber Company. Now, that isn't true, is it?

Mr. Horrow: The Exhibit 2-B shows the two notes of \$150,000 and \$250,000 were issued in 1930. The other notes cover these interest amounts that

were restated as a part of the principal under the agreement of 1936.

The Court: I see. That is as the accrued and unpaid interest. Now, the interest rate on the books is $5\frac{1}{2}$ per cent, is that right? I thought that was reduced?

Mr. Horrow: Well, that was the amount shown originally but the 1936 agreement provided that the interest would accrue after January 1, 1938, at 3 per cent.

The Court: So that the detail in the letter [20] which is Exhibit 2-B relating to interest rates only sets forth the original amount of the interest which was specified in the notes and we understand that when these noteholders got them they were to be paid only 3 per cent interest; is that right?

Mr. Horrow: That is covered by the agreement of 1936, Page 45 of the Stipulation. The various interest rates that are applicable during these periods as specified in that agreement.

The Court: Does the letter 2-B have a date to it?

Mr. Horrow: We have stipulated the date of the agreement as July 15, 1941.

The Court: That is at the end of the letter. I would like to take a recess for just a minute, Mr. Horrow, and then you call your witness, if you will excuse me.

(Short recess.)

The Court: Call your witness, please.

Mr. Mather: If your Honor please, before the witness is called you asked the question of what the American Trust Company was the collection

agency for these notes? It is the position of the Respondent that the American Trust Company was the collecting agency for these notes appointed by these Petitioners pursuant to Exhibit 2-B.

Mr. Horrow: If your Honor please, I will call Mr. Francis Whitmer as witness for the Petitioners.

Whereupon, [21]

FRANCIS E. WHITMER

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Horrow:

Q. Will you give your name and address?

A. Francis E. Whitmer. The address is 464 California Street, San Francisco.

Q. What is your occupation, Mr. Whitmer?

A. Trust Officer of American Trust Company.

Q. You have been subpoenaed to appear as a witness in these proceedings? A. I have.

Q. What are your duties as Trust Officer?

A. I am Assistant General Manager of the Trust Department for the American Trust Company and its trust branches.

Q. What activities of the American Trust Company are under your supervision?

A. The safekeeping and custody accounts. What we call private or living trusts are the primary re-

sponsibilities and, in a general way, internal operations.

Q. Do you also have supervision over registration of corporate securities? A. I do. [22]

Q. Was that true during the year 1941, Mr. Whitmer? A. It was not.

Q. You were in the Trust Department of the American Trust Company at that time?

A. I was.

Q. You are familiar with the activities which you now have supervision over? A. I was.

Q. You were in the Trust Department throughout the period from 1941 up to the present time?

A. No, that is not correct. I was in the Trust Department up until September 15 of 1942, was then transferred to the Personnel Department and remained in the Personnel Department until September 15, 1945. I then returned to the Trust Department.

Q. Are you familiar with the account of the American Trust Company designated in its records as "Agency Account, Mrs. Edith Lamm, et al."?

A. I am.

Q. You were in the Trust Department at the time this account was established? A. I was.

Q. Do you have with you the records of the American Trust Company pertaining to this account? A. I do. [23]

Q. You have seen a copy of the Stipulation of Facts, Mr. Whitmer, which has been filed in this case? A. I have, yes, sir.

Q. I direct your attention to Exhibit 3-C of that Stipulation, appearing on Page 55, and Page 56 of

(Testimony of Francis E. Whitmer.)

the Stipulation. I direct your attention to the words, "Correct Final List," appearing thereon. Are those words in your handwriting on the original list? A. They are, yes, sir.

Q. You have with you the original list, copy of which I referred to? A. I do, yes.

Q. I direct your attention to the deletion of the words "Natural Guardian" appearing on Page 55, Exhibit 3-C, of the Stipulation and the insertion of the word "Trustee." Is that in your handwriting, Mr. Whitmer? A. On the original, yes.

Q. What was the reason for the deletion of the words "Natural Guardian" and the substitution of the word "trustee" on the original list?

A. When the American Trust Company received the executed counterpart of this letter of instructions or agreement it had been executed by Alice McCourt Lamm, Natural Guardian for Winifred Carol Lamm. We wrote her a letter asking if, in fact, she was intended to sign that as the natural guardian [24] or whether she meant her just to be the owner of that interest in some other capacity.

Q. Do you have with you a copy of that letter?

A. I do. I have a copy of the letter that went to her and also the original of her response.

Q. Will you produce the copy of that letter addressed by the American Trust Company to Alice McCourt Lamm? A. (Producing document.)

Mr. Horrow: Your Honor, I offer in evidence the letter just referred to as Petitioner's exhibit next in order.

Mr. Mather: No objection.

(Testimony of Francis E. Whitmer.)

The Court: Received in evidence as Exhibit 5.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 5.)

PETITIONER'S EXHIBIT No. 5

August 26, 1941

Mrs. Alice McCourt Lamm
Modoc Point,
Oregon.

Dear Mrs. Lamm:

We have received from Mr. H. E. Nowell the agreement signed by you as "Natural Guardian for Winifred Carol Lamm," relating to the participation in the acquisition of the Lamm Lumber Company's obligation. If you were in fact acting as guardian for Winifred's property it would be necessary, according to the advice of our attorneys, for you to institute legal proceedings to have yourself formerly appointed guardian before we could recognize your signature to the agreement or pay you money. Upon discussing the matter with Mr. Nowell, however, he informs us that the money does not represent property belonging to Winifred but that on the contrary it represents funds contributed by her parents and her grandmother and turned over to you for the express purpose of avoiding any conditions giving rise to a need for legal guardianship. At Mr. Nowell's suggestion we have prepared the enclosed letter which sets forth the

(Testimony of Francis E. Whitmer.)

facts as he has presented them to us. If agreeable, we shall appreciate your changing the letter in any necessary respects, after which kindly have it signed by Winifred's father, grandmother, and yourself, and return it to us.

Very truly yours,

/s/ B.

B. B. BROWN,

Vice President and Trust
Officer.

Enclosure.

Edith Lamm, et al. A-3726.

Admitted November 15, 1949.

Q. (By Mr. Horrow): Did the bank receive a reply from Alice McCourt Lamm to that letter?

A. It did, yes.

Q. Do you have a copy of that reply?

A. I do.

Mr. Horrow: I offer in evidence, your Honor, a copy of a letter addressed by Alice McCourt Lamm to the American Trust Company dated August 28, 1941.

Mr. Mather: No objection.

The Court: Received in evidence as [25] Exhibit 6.

(The document referred to was received in evidence and marked as Petitioners' Exhibit No. 6.)

(Testimony of Francis E. Whitmer.)

PETITIONERS' EXHIBIT No. 6

August 28, 1941

American Trust Company
464 California Street
San Francisco, California

Gentlemen:

This refers to the "Instructions and Agreement" addressed to you, dated as of July 15, 1941, relating to an obligation of the Lamm Lumber Company and signed by me as "Natural Guardian for Winifred Carol Lamm." The \$12,000 to pay for the 5.835653 percentage participation covered by the said agreement, represents \$4,000 placed in my hands by Winifred Carol Lamm's father, \$4,000 placed in my hands by her grandmother, and \$4,000 of my own funds set aside for her benefit. It was the understanding that this money would be held by me as Trustee for Winifred's benefit, to be used to purchase the participation in the Lamm Lumber Company's obligation, and generally to be dealt with by me as Trustee with all the powers of an absolute owner. You are requested to change your records to show this interest as belonging to "Alice McCourt Lamm, Trustee for Winifred Carol Lamm."

Very truly yours,

/s/ ALICE McCOURT LAMM.

We join in the foregoing statement and request.

/s/ W. E. LAMM,

/s/ MRS. EDITH LAMM.

Admitted November 15, 1949.

(Testimony of Francis E. Whitmer.)

Q. (By Mr. Horrow): Referring to the account designated "Agency Account," Mrs. Lamm, et al., was that account opened at your direction, Mr. Whitmer? A. It was.

Q. What procedure was followed in opening the account with the American Trust Company?

A. The notes referred to were delivered to us and the various parties in interest each executed a counterpart of the letter of instructions and agreement. When those were all informed and we had received this list of the owners, referred to as correct final list, or Exhibit 3-C, the notes were placed in the file and it became my responsibility to give a notice to each of the persons working in the Trust Department who would have supervision over some activity in the management of the account.

Q. What form did that notice take?

A. What we call an internal memorandum which is really an office memorandum, or letter of instructions.

Q. Do you have a copy of that memorandum, Mr. Whitmer? A. I do.

Mr. Horrow: Your Honor, I offer in evidence as Petitioners' Exhibit next in order the memorandum referred to [26] by the witness dated August 27, 1941.

Mr. Mather: No objection.

The Court: It is received in evidence as Exhibit 7.

(The document referred to was marked and received in evidence as Petitioners' Exhibit No. 7.)

(Testimony of Francis E. Whitmer.)

PETITIONERS' EXHIBIT No. 7

Memorandum

August 27, 1941

To: Mr. R. O. Boyer

Mr. Gus G. Conlan

Mr. W. G. King

Mr. Dave Stearns

Trust Auditor

Trust Files

From: Mr. Francis E. Whitmer

Assistant Trust Officer

Re: A-3726 Mrs. Edith Lamm, et al.

The above is a new Agency Account under Letter of Instructions signed in counterpart by 19 owners, the Letter being dated July 15, 1941.

Mr. King is handed herewith list of owners showing the proportionate interest of each in the total. They are to share in the income and net principal payments in the proportion therein shown. Income and principal are to be kept separate for accounting purposes and each of the owners provided with a statement quarterly, beginning December 10, 1941, showing receipts and disbursements of interest and principal.

Mr. Conlan will please have recorded in Lake County and Klamath County, Oregon, the Assignment of Mortgages dated July 9, 1941, now held by us.

(Testimony of Francis E. Whitmer.)

Mr. King will please pay to Mr. H. Edwin Nowell from income on hand \$676.05. The Instructions and Agreement signed by owners indicate that this payment should be made from principal, but this is incorrect as the amount represents a reimbursement to Mr. Nowell for accrued interest paid out by him in the acquisition of the notes of Lamm Lumber Company representing the corpus of this account. Inasmuch as we have received payments from Lamm Lumber Company, this payment to Mr. Nowell can be made at the present time and will show on our first statement to the owners and thus clear itself.

Quarterly, beginning September 10, 1941, we are to send each of the owners separate checks for their shares of the principal and their shares of interest. Our charges are to be deducted from principal. The schedule of fees to be paid to us is as follows:

(a) Acceptance fee—\$500.00.

(b) Annual Fee—\$100.00 plus 1/10 of 1% of the unpaid balance of principal at the beginning of each year.

The papers are dated July 15, 1941, and the principal indebtedness at the beginning of this account is \$411,264.99, therefore the first year's fee will be the \$100.00, plus \$411.26, or a total of \$511.26.

(c) Closing fee—\$250.00.

Any fees paid by Lamm Lumber Company on

(Testimony of Francis E. Whitmer.)

account of the above are to be credited before making our charges against the principal.

Yours very truly,

/s/ J. V.

FRANCIS E. WHITMER,
Assistant Trust Officer.

Admitted November 15, 1949.

Q. (By Mr. Horrow): Directing your attention to the second paragraph of Petitioners' Exhibit 7, Mr. King is handed herewith list of owners showing the proportionate interest of each in the total. To what does that have reference, Mr. Whitmer?

A. That would be a copy of the list of owners which I had marked "Correct Final List," showing the percentage interest that each had in the indebtedness, so that Mr. King, who was in charge of the Bookkeeping Department, would have that to work from as payments came in to us.

Q. Did Mr. King have a copy of the original list, a copy of which is Exhibit 3-C, or did Mr. King have the original?

A. Mr. King was handed with my memorandum a copy of this list.

Q. Where was the original kept, Mr. Whitmer?

A. In what we would call the documentary section of our file. We undertook to segregate the correspondence and letters of instructions from the

(Testimony of Francis E. Whitmer.)

owners. We also sometimes referred to the file as the legal file. [27]

Q. Did the notes remain in the possession of the American Trust Company until they were paid in full in 1943? A. So far as I know.

Q. Your records show what was done with those notes when they were paid in full in that year?

A. Yes.

Q. Would you state what was done?

A. They were returned to the debtor.

Q. Were they marked "cancelled"?

A. Yes.

Q. Will you describe the procedure followed in receiving payments from the Lamm Lumber Company and making disbursements of such amounts?

A. Well, each time a payment came in from the Lamm Lumber Company in the amount of interest up to the—I believe they were all calculated to the first of the month—interest would have been calculated and the amount of that interest posted on our—what we call an income cash ledger sheet. The balance would have been treated as principal and posted on the principal cash ledger sheet and then we keep a subsidiary ledger of all notes and contracts that are due to us whether they are secured or not and the Bookkeeping Department would have made a similar entry to that ledger showing the amount of interest and principal and calculating the new balance. That would be the receipt of the money and our [28] disposition of it and then the

(Testimony of Francis E. Whitmer.)

amount of interest and principal would be apportioned among each of the owners in accordance to the percentage shown on this letter, a copy of which Mr. King had. He maintained a work sheet so that on each disbursement the income was disbursed separately and principal was disbursed separately to these individuals shown on this list in accordance with that percentage.

Q. You were referring to the percentage shown on the list which was submitted to Mr. King under the memorandum, Petitioners' Exhibit 7?

A. That is right. I don't know whether you are interested in the internal operations beyond what the bookkeeper does, but I can describe it to you.

Q. Would you describe the practice followed by the bookkeeper in making payments?

A. We have a bookkeeper whose duty it is to work only on what is called this custodian or safe-keeping or agency desk. It is a girl whose duties are completely handling all receipts of income and principal and all disbursements of income and principal. When this account was first set up it would have been her duty to make up a card for each one of these participants. The card is just a little working card showing the name of the account, when the payments are anticipated, because they are kept in chronological file, and the name of the person and the percentage in this case of their [29] interest in both the income and principal. Those cards are kept together. This was the January, April, July, October transaction. They would have been filed together.

(Testimony of Francis E. Whitmer.)

First in January and then when the January transaction was completed they would have been moved to the section of the file for April anticipation so that as the girl goes through her work she is able to tell whether there are any items anticipated that have not in fact been received, and then when the payment would come in from the Lamm Lumber Company she would withdraw these cards bearing upon this account from her file and calculate these percentages and then hand the calculation to Mr. King for checking, and then if the list were returned to her as being correct she would actually type up the checks ready for signatures of the two persons who have to sign under our internal operating roles, have to sign each of the checks. They would be then returned to Mr. King and he would second-check them to be sure that the amounts of the interest and principal were actually typed up in accordance with that list and then after having signed them officially on behalf of the Bank he would have returned them to the typist and she would have typed an envelope ready for the check to be mailed out. Now, in order that each one of these people could have a complete statement of the transaction, we prepared a statement to accompany the check which showed the total amount of interest and principal that came in from the Lamm Lumber Company [30] and the amount of the division among the participants and a statement at the end of that list as to balance of principal that was due

(Testimony of Francis E. Whitmer.)

from the Lamm Lumber Company upon this indebtedness.

Q. This list to which you have referred against which these disbursements were checked is the list, a copy of which is Exhibit 3-C?

A. That is right.

Q. Under the practice followed by the bank in connection with this account, would payment be made to any persons not shown on such list?

A. No, because that represented 100 per cent of the ownership, or our record of 100 per cent of the ownership.

Q. What was done with the card records?

A. Those are maintained until anywhere from a year to a year and a half. The account is closed and final statements have been rendered to the owners, and then because they are strictly internal operating records of no particular permanency or significance they are destroyed.

Q. The card records with respect to this account have been destroyed, is that correct?

A. That is the little individual card records, yes. We have, of course, for the permanent record a copy of the statement that was rendered to each of the owners and that becomes a part of the permanent record which is presently [31] available.

Q. Does the American Trust Company act as a registrar in connection with corporate securities?

A. It does, yes.

Q. Are you familiar with the practices followed by the bank in connection with such registration?

(Testimony of Francis E. Whitmer.)

A. I am.

Q. How is such registration disclosed on the records of the American Trust Company?

A. We keep a card record showing the name of the debtor, corporation, and the name and address of the registered owner.

Q. Is that card record purported to show the registered owner of securities for which the American Trust Company is registrar?

A. It does, yes.

Q. Are those card records similar to the card records that were kept in connection with the agency account, Edith Lamm, et al.? A. No.

Q. In what respects do the card records differ?

A. The card record for the registration of securities is divided in such a way that there is on the same card a record of bonds that are cancelled, registration in the name of the first owners and, perhaps, re-registered in the name of a purchaser. They are set up a little differently because the [32] purpose of the card is to be a history card showing the owner's name and the number of bonds owned, cancelled, and registration or picked up in registration card.

Q. Are the card records the same in that they show the owners of the indebtedness?

A. Yes.

Q. Are they the same in showing the amount of the principal of the indebtedness which is owned? A. Yes.

Mr. Horrow: That is all, your Honor.

(Testimony of Francis E. Whitmer.)

Cross-Examination

By Mr. Mather:

Q. Mr. Whitmer, in setting up this agency account, you referred to Exhibit 3-C. That was done pursuant to your letter of instructions, Exhibit 2-B, was it not, attached to the Stipulation?

A. This list that is Exhibit 3-C was not prepared in our office. That was turned in to us as the list of the owners.

Q. Pursuant to the instructions contained in Exhibit 2-B.

A. I don't want to misconstrue your question, is all, Mr. Mather. The list was furnished us as the list of the people from whom ultimately we would receive signed counterparts of the instructions and agreement.

Q. Exhibit 2-B is a signed counterpart that you received [33] from each of the individual owners, is it not?

A. This is a copy of the document which the owners signed, counterparts, yes.

Q. You have Exhibit 2-B signed by each of the individuals appearing on Exhibit 3-C?

A. That is correct.

Q. You carried out the instructions contained in Exhibit 2-B, did you not? A. Yes.

Q. The method of carrying it out is the method that you employed in the bank in carrying out those instructions? A. Yes.

(Testimony of Francis E. Whitmer.)

Q. Now, is that method any different than used by you in collecting past due promissory notes left with you for collection by other holders?

A. Well, to this extent, that we have the list of the various owners to work from where in the ordinary safekeeping account it belongs to one or two persons and any payments that come in to us are just distributed to the owners of the account.

Q. But you did have past due promissory notes that were owned by more than two persons, didn't you, at that time?

A. I would have to assume that we did. I do not know for a fact.

Q. Your procedure in making your disbursements was not [34] dissimilar in this instance than in any other instance, was it?

A. Not dissimilar, no.

Q. In other words, you followed the instructions that were given to you by the person who left the notes with you for collection?

A. That is right.

Q. In maintaining a register that you testified about with respect to register, that all pertained to stocks that were registered stocks?

A. May I correct you? The registered bonds, you mean?

Q. Well, you didn't have other than bonds that were registered that you maintained a register for?

A. Well, the stock registrations is a completely different type of activity in the Trust Department. That deals with the corporate issue where the Cor-

(Testimony of Francis E. Whitmer.)

poration Commissioner authorizes so many shares to be issued and we in Registered Securities see that the total number of shares outstanding are not in excess of the permit, but we are not interested in that type of case with who the owner is. We don't keep a record of the owner.

Q. The register you maintained was with respect to the bonds? A. That is right.

Q. Those are registered bonds?

A. That is correct. [35]

When we are the registrar of an issue of registered bonds, then we keep this record I have indicated.

Q. These promissory notes that you had for collection in the agency account, Mrs. Edith Lamm, et al., were not registered notes, were they?

Mr. Horrow: I object to that, your Honor, on the ground that it calls for a conclusion of the witness. That is the very issue in this case, your Honor.

The Court: The question, as I understand it, goes to the practice of the Trust Department and—are you able to answer that question?

The Witness: The question Mr. Mather asked?

The Court: Don't answer the question yet, but are you able to answer the question?

The Witness: I would like to hear the question again.

The Court: Read the question, please.

(Question read.)

(Testimony of Francis E. Whitmer.)

The Court: Are you able to answer it?

The Witness: I doubt it.

The Court: You don't think you can answer it.

Mr. Horrow: Your Honor, I think that calls for a conclusion of law, nothing to do with this.

The Court: There is a conclusion involved in the question, that is true, and the conclusions to be made by the Court, but if the witness were able to answer the question I [36] would overrule the objection in order to find out what the witness' understanding is, that is all. I do overrule the objection and the witness may state whether he is able to answer the question or not.

A. Well, I might make a comment on the thing without, perhaps, answering the question directly.

Q. (By Mr. Mather): I will withdraw the question.

Do you know whether these promissory notes were in registered form?

Mr. Horrow: I object to that, your Honor, as calling for the conclusion of the witness.

The Court: Objection overruled.

Mr. Horrow: Exception, please.

A. Our bonds when they are first issued are either bearer bonds or they are issued to a particular person whose name is indicated on the bond. If it is not a bearer bond, then it is registered to a person who is the owner. In the case of the Lamm notes, they were all payable to a specific person or corporation or nominee, and I think the counsel called it. Consequently, there isn't the possibility

(Testimony of Francis E. Whitmer.)

of drawing the simile between the two. They were not coupon instruments but they were registered, every one of them was registered to a particular payee.

Q. That would be true of any promissory notes, would it [37] not, wherein——

Mr. Horrow: I object.

Q. (By Mr. Mather): ——wherein these notes——

The Court: The objection is overruled, Mr. Horrow.

Q. (By Mr. Mather): ——wherein these notes differ from any other promissory note?

A. When a corporation borrows money upon a bond issue its promissory notes are in the form of a bond and they are payable to bearer generally.

Q. Well, now, you have got the notes set out here in Exhibit 1-A, and we will take it first. Now, would you point out wherein that note differs from the usual promissory note.

Mr. Horrow: If your Honor please, I object to that as argumentative, calling for a conclusion, nothing in the record to show what the usual form of promissory notes is.

The Court: Well, the witness is well acquainted with notes and various forms of notes. The objection is overruled.

Mr. Horrow: Exception, please.

A. If your point, Mr. Mather, goes to the question of the ordinary promissory note payable to an

(Testimony of Francis E. Whitmer.)

individual, I would say that it is probably in the same form or generally the same form as is used. It is quite different from a bearer [38] bond form of promissory note which has much more in the way of recitals.

Q. (By Mr. Mather): This is a promissory note, isn't it? A. Yes.

The Court: What is the witness referring to at this point?

Mr. Mather: Exhibit 1-A, \$150,000 note, dated May 6, 1930.

The Court: What page is that on?

Mr. Mather: Page 16 of the Stipulation of Facts.

The Court: Now, what is your answer, Mr. Whitmer? You say that this note is similar to most promissory notes?

The Witness: I would say it is similar to most promissory notes that were issued about that time and calls for payment in gold, for example, which is not a form customarily used now, but it generally follows the form of a promissory note **that is currently used.**

Q. (By Mr. Mather): You have examined the other notes and are familiar with the other notes that were involved in this account and that is true of all of them, isn't it? A. Yes.

Mr. Mather: That is all.

Mr. Horrow: Just a few more questions, your Honor. [39]

(Testimony of Francis E. Whitmer.)

Redirect Examination

By Mr. Horrow:

Q. Mr. Whitmer, in your direct testimony you referred to registration of corporate securities and the practice followed by the American Trust Company. That had reference to corporate bonds and debentures that are registered, is that not correct?

A. Yes.

Q. Does the American Trust Company have a department which handles the collection of notes, promissory notes?

A. We have two divisions. The corporate division is a separate activity in the Trust Division, and we have spealized personnel assigned to that. If the obligation is an obligation of a corporation which represents outstanding interests in the hands of the public, that is handled by the Corporate Division. The other division is the Accounting Department, which handles living trusts, testamentary trusts, probates, things of that sort.

Q. I am talking about debts turned over to the American Trust Company by its customers for collections. What department handles such activities?

A. We refer to it as the "Cage." It is a group of people who receive the obligations, set up the necessary records, and then must account for all principal transactions and then we have a separate accounting department that actually handles [40] the cash.

Q. Is that in the Trust Department?

(Testimony of Francis E. Whitmer.)

A. Those are all part of the Trust Department, yes.

Q. In such cases does the Bank maintain a record, a card record, of ownership such as you have referred to in connection with the Lamm Account?

A. Yes.

Q. Does it also have a list of ownerships such as we have referred to in connection with the Lamm Account?

A. Ordinarily it would not be necessary, because the names of the owners would be the depositors with us, but their names would appear on the record as the account owner. In this case we had many owners and so it was necessary to keep a list of them.

Q. Now, referring to the transfer of registered corporate bonds or debentures, such transfer effected by a change in the card records would appear on the books of the register—registrar?

A. Yes.

The Court: Now, that question is whether—read the question, please.

(Question read.)

Mr. Horrow: I will repeat that, your Honor.

Q. (By Mr. Horrow): In the change of ownership in connection with registered [41] and corporate bonds or debentures effected by a change in the name of the record owners appearing on the card records, to which you have reference?

A. Yes.

(Testimony of Francis E. Whitmer.)

The Court: Then I will have to interrupt you there, Mr. Horrow, to ask another question. The question was stated twice and you will notice that Mr. Horrow asked you whether the change was effected by you. He used the words "effected by a change on the card." Do you know the meaning of "effected by"? It means to bring about. Now, it is the Court's understanding that when registered bonds are issued that the instrument has the name of the payee owner written in the bond, isn't that correct?

The Witness: Not necessarily.

The Court: Not necessarily. Is that sometimes correct?

The Witness: Ordinarily the face of the bond would indicate that the bond was payable to bearer, or if it is registered, to the registered holder, and on the back of the bond——

The Court: Just the words "registered holder" are used on the face of the bond?

The Witness: On the face of the bond.

The Court: One other point, the bond has a number, doesn't it? [42]

The Witness: Yes.

The Court: On the back of the bond.

The Witness: There is what, for lack of better words, might be called a box printed on the back of the bond, a place for a date.

The Court: Yes.

The Witness: And a place for the name of the registered owner and a place for a signature of an

(Testimony of Francis E. Whitmer.)

authorized officer of the registrar with some language on top of the box which says, "No writing shall be made in this box except by the registrar," and then that constitutes the registration of it.

The Court: Well, then, if I understand you correctly, this would be the situation: the Trust Company is appointed by the Zellerbach Paper Company as registrar of its 4½ per cent bonds. That is done by a separate instrument. Mary Smith becomes the owner of registered bond for \$5000, Bond No. X582. The bond is issued by an issuing agent of some kind. That is to clear through the registrar department some way. A card is made up with——

Mr. Horrow: If your Honor please——

The Court: May I just continue this, please?

A card is made up for Bond No. X582 in the name of Mary Smith and her name is inserted and probably the date that she became registered owner of the bond. Now, Mary Smith [43] decides to sell her bond to her brother Tom Smith. That Bond X582 has to be turned over to the registrar, doesn't it, and doesn't the registrar have to write on the back of that bond, "Tom Smith," and the date that he became an owner, and then change it and add the name of Tom Smith and the date of his ownership onto the card that the registrar holds for Bond No. X582.

The Witness: The answer calls for some explanation, your Honor, if I may give it.

The Court: I guess you can answer that "Yes" or "No." I expect you may have to retrace that

(Testimony of Francis E. Whitmer.)

and tell me whether the example is right or wrong, but what I want to find out is how the bond itself evidences the change of ownership.

Mr. Horrow: If your Honor please, I have a specimen of a form of registered bond in connection with——

The Court: Is it just a form, Mr. Horrow?

Mr. Horrow: It is identical.

The Court: Is it just a specimen?

Mr. Horrow: It is identical in all respects, except that the bond is not actually issued.

The Court: May we just have that received later, then? I would like to just ascertain this for myself. Now, Mr. Whitmer, would you explain to the Court exactly what happens as far as the bond is concerned. We can understand what your card record is, but what happens to the instrument itself? [44] A bearer bond can be transferred without any notation on the instrument itself. It is payable to the bearer, so if Mary wants to sell her bond to her brother Tom she just hands the bond over to him and he can receive payment of that bond simply by presenting it, isn't that true?

The Witness: No, not quite, your Honor. If the bond were registered in the name of Mary Smith and she wished to——

The Court: I was talking about a bearer bond. It is true with respect to a bearer bond?

The Witness: It passes by delivery only.

The Court: Now, with respect to a registered bond, let me just ask you this question: If Mary

(Testimony of Francis E. Whitmer.)

Smith wants to sell her registered bond to Tom Smith, doesn't her registered bond have noted on the back of it the name of Tom Smith?

The Witness: It would not have to in order to constitute a sale from her to her brother.

The Court: I didn't ask you whether it had to constitute a sale. I asked you whether it had to in order to take care of the requirements of a registered bond.

The Witness: No. The answer to your question, then, would be "No."

The Court: You don't note anything on the back of the registered bond. I thought you just said that you did.

The Witness: Well, I may be misunderstanding your [45] Honor. If she wants to transfer the ownership of the bond to her brother, she would either probably sign what is called a bond assignment, a separate assignment of the instrument, and attach that to the bond. Then it becomes a bearer bond unless the bond assignment form has been executed to him personally.

The Court: Yes.

The Witness: If it is executed to him personally then he has an alternative either to present that bond for registration in his own name or he in turn could sell it to someone else if it is in blank, because once the bond assignment is executed in blank with signatures properly witnessed and guaranteed, the bond becomes a bearer instrument.

The Court: That wasn't my question. My ques-

(Testimony of Francis E. Whitmer.)

tion assumed that Mary Smith was the registered owner of the bond and Tom Smith wants to become a registered owner of the bond too. He buys it from her and he wants his bond to be registered also, and he does have it registered. How does the bond look then after he has done all that he should do to have it registered?

The Witness: The second line, if this were an original issue showing Mary Smith as the owner, the second line of the registration box would then have a new date in it and a new registered name put in and a new signature of an authorized officer of the registrar.

The Court: And in order to effect that there would [46] be an instrument of assignment executed by Mary Smith to Tom Smith.

The Witness: That is correct.

The Court: If she executed an assignment in blank, that would make her bond a bearer bond?

The Witness: That is correct.

The Court: But if she executes the assignment by saying that the bond—she assigns the bond to Tom Smith, then he may, if he wishes to, have it registered and you will accept that assignment and register it in his name, is that right?

The Witness: If the assignment is in correct form, yes.

The Court: If it is in correct form, but you do have a separate form that is made up for the owner of a registered bond to execute, isn't that right?

The Witness: That is right.

(Testimony of Francis E. Whitmer.)

The Court: Then you keep that in your records in connection—in your records of that issue of registered bonds, don't you?

The Witness: The bond assignment form?

The Court: Yes.

The Witness: Yes, we do.

The Court: That is part of the duty of the registrar of bonds, isn't that correct? [47]

The Witness: That is correct.

The Court: Would you like to offer that blank form now?

Mr. Horrow: I would like to have some testimony from the witness in connection with it, your Honor.

The Court: One other thing. After the bond has been assigned and presented to you for registration, at the same time you make the changes on the cards which you keep?

The Witness: Yes, we make a record before the bond is actually signed by the authorized officer and accompanying form must go along with the information, his signature also will be a posting medium within the bank showing the old owner's name and bond number and new owner's name and bond number.

The Court: You say, before the bond is signed by the issuing officer?

The Witness: By the officer making the registration.

The Court: By the officer making the registration?

(Testimony of Francis E. Whitmer.)

The Witness: Yes. That is to assure ourselves there is a posting medium it goes through so our records on these cards will then show a cancellation of the old registration and the entry of the new registration.

The Court: Then I come to this question: Were you entirely correct when you answered Mr. Horrow's question when you say that the change in the registration was effected by a notation on your cards? Isn't that only a partial answer to [48] that question?

The Witness: Yes. I didn't give full significance to the word "effected." It is all of this procedure has to be done. The acceptance of a bond, transfer form, and the entry on the back of the bond, the signature of the officer and the accompanying internal forms also duly signed transmitted to the bookkeeping department and ultimately posted upon the card record. That would all be part of the transaction which would effect the registration.

The Court: Well, I wanted to clear up that point in the witness' answer, Mr. Horrow, because the Court knows enough about the transactions to know that answer wasn't correct. That is all.

Mr. Horrow: I will show your Honor how the answer is entirely proper in the sense of registration.

The Court: I beg your pardon?

Mr. Horrow: I would like to——

The Court: Wait a minute now. What did you say?

(Testimony of Francis E. Whitmer.)

Mr. Horrow: I asked the witness with respect to registration and I will try to develop testimony from this witness which will indicate that his response with respect to the manner of changing registration on the books of the bank was correct.

The Court: Mr. Horrow, I think we may as well be rather candid about this matter. The Court understands why [49] you think that this is very important, but, perhaps, it isn't quite as important as you think it is to the decision of the question in this case, for this reason: If I may just digress here, you can ask this question later. These notes of the Lamm Lumber Company were originally made payable to the Consolidated Securities Company. Then the Consolidated Securities Company endorsed those notes without recourse to the Anglo-California National Bank of San Francisco. That is a fact which hasn't been developed from the exhibit that is attached to this stipulation, Exhibit 1-A, shows that.

Mr. Horrow: The Stipulation refers to it.

The Court: That endorsement was made on May 26, 1930. Then on July 9, 1941, the Anglo-California Bank, which held those notes for some reason or other, without recourse to the American Trust Company. Now, there they stood. The facts show that interests in these notes were sold to various people. Now, the notes, these interests, were undivided interests and no new notes were issued to each individual. The evidence of the interest of the individuals in the notes is the agreement which the

(Testimony of Francis E. Whitmer.)

American Trust Company sent out to the purchasers of undivided interests which is Exhibit what?

Mr. Horrow: Exhibit 3-C is the list of ownership which was not a part of the agreement but——

The Court: Exhibit 2-B is the means by which the purchasers of undivided interests became owners of undivided [50] interests, isn't that true, or am I incorrect?

Mr. Horrow: Your Honor, the Stipulation shows that the individuals acquired ownership by purchase from the Southern Pacific Land Company. Southern Pacific Land Company was not a party to the agreement entitled "Instructions and Agreement," Exhibit 2-B.

The Court: Well, that is right, but—well, I guess perhaps I can't go into that at this time. I would suppose that there was something in evidence to be evidence of the ownership of an undivided interest in these notes. Now, was there or wasn't there?

Mr. Horrow: There was, your Honor, and it is our position the evidence of ownership was the list which is in evidence and was maintained by the American Trust Company as the evidence of ownership.

The Court: Then the point that I was getting to is that if any one of these owners of an undivided interest wanted to transfer her interest it would be your position that the transfer of that interest would have to be reported to the American Trust

(Testimony of Francis E. Whitmer.)

Company and the transferee's name added to list 3-C, isn't that your position?

Mr. Horrow: The agreement so provides, your Honor.

The Court: The agreement, which is Exhibit 2-B.

Mr. Horrow: Yes.

The Court: It is your position, then, that the change [51] on this list in itself would be tantamount to all that is done in changing the evidence of transfer of interest in a registered bond, isn't that your position?

Mr. Horrow: That is our position, your Honor. I would like to develop that line of inquiry.

Q. (By Mr. Horrow): Mr. Whitmer, I show you a document here entitled "California-Oregon Power Company, First Mortgage Bond, Series Due April 1, 1978, 3 $\frac{1}{8}$ Per Cent." Will you tell me what that is?

A. It is a specimen form of a bond in California-Oregon Power Company with coupons attached.

Q. Was that bond registered as to principal with the American Trust Company?

A. No, this is only a specimen.

Q. Was that bond—I withdraw that question.

Was that bond issue registered with the American Trust Company as to principal?

A. I will have to say that I do not know.

Q. Referring to the document itself, and directing your attention to the language at the office of the American Trust Company and references to the

(Testimony of Francis E. Whitmer.)

American Trust Company, would that indicate to you that the American Trust Company acted as Registrar in respect to the issue of bonds, of which that is a specimen? [52]

A. At least that it was contemplated. The only reason I am demurring is that I do not know that this transaction ever was fulfilled and the bond actually issued.

Q. Is that form similar to the form used in connection with registered corporate bonds and debentures? A. Yes.

Mr. Horrow: Your Honor, I offer in evidence Petitioner's Exhibit next in order, the document referred to by the witness.

Mr. Mather: No objection.

The Court: May I see it, please?

You haven't asked the witness to refer to it.

Mr. Horrow: I intend to do that, your Honor.

The Court: You are going to ask him to refer to it.

Received in evidence as Exhibit 8.

(The document referred to was marked and received in evidence as Exhibit No. 8.)

Q. (By Mr. Horrow): Mr. Whitmer, reading from Petitioner's Exhibit No. 8, as provided in the indenture, this bond may from time to time be registered as to principal in the holder's name at the office of the Trustee at San Francisco, California, or at the option of the holder at the agency of the company at Chicago, Illinois, or at the agency of

(Testimony of Francis E. Whitmer.)

the company in the Borough of Manhattan City and State of New York on the books and records [53] of the company to be kept for that purpose at said offices and agencies and shall pass by delivery unless so registered as to principal. Such registry being noted hereon as provided in the indenture.

The line with registration on the books of the company has reference to what practice, Mr. Whitmer?

A. The practice that the registrar has of noting the name of the owner on the reverse side of the bond, signing that by an authorized officer, making up the appropriate records to show that and ultimately posting it upon a card which indicates the names and addresses of the outstanding holders of registered securities.

Q. Reading again from the specimen, Petitioners' Exhibit 8:

“After such registration no further transfer of this bond shall be valid unless made on said books by the registered owner in person or by an attorney duly authorized and similarly noted hereon, but this bond may be discharged from registry by being in like manner transferred to bearer.”

To what has “registration on said books”—to what does that refer?

A. Well, the only registration books that we ultimately keep are the cards. Those are the lists from time to time—or those are the cards from which the lists of registered [54] owners are made

(Testimony of Francis E. Whitmer.)

and those cards are kept by us on behalf of the various corporations we represent of the various issues.

Q. And the language "Notation of registry on the bond" has reference to what? I show you Petitioners' Exhibit 8.

A. It would be an entry placed on the form of the bond showing the date of registration, the name of the registered owner, and the signature of some officer of the Trust Department who was authorized to sign on behalf of his department.

Q. Does the language which I have read cover the transfer at the usual form of provisions dealing with the transfer of registered bonds?

A. So far as I recall, yes.

The Court: May I have that, Mr. Horrow? You mean by your last question, is the wording on the bond the usual wording that is inserted in the terms?

Mr. Horrow: Of a registered bond.

The Court: Of a registered bond, or inserted in a bond which may become a registered bond.

Mr. Horrow: That is correct, your Honor.

The Court: I was just reading while you were conferring with counsel.

Mr. Horrow: I was afraid the delay was by reading of Petitioners' Exhibit No. 8.

Q. (By Mr. Horrow): Mr. Whitmer, I would like to direct your attention to [55] Page 53 of the Stipulation of facts, the paragraph in Exhibit 2-B, reading as follows:

(Testimony of Francis E. Whitmer.)

“You shall not be bound to take notice of any change in the ownership of the interests of any of the undersigned unless and until there shall have been filed with you such documentary evidence as you shall consider necessary to establish such change.”

Under the practice followed by the bank in connection with this account, what documentary evidence would be required?

A. I would assume that an assignment in general form transferring the ownership or reciting that it transferred the ownership of the person executing the assignment to the named assignee properly witnessed or, perhaps, even acknowledged because some of these parties were out of the state would have been acceptable. We were not asked to recognize that because there were not any changes, but I assume that would have been adequate.

Q. Is that sort of an assignment that you would require in connection with the change of registration of a corporate bond or debenture of which you were the registrar?

A. Not form of assignment. That is customary in connection with registered bonds as a printed form which not only undertakes to transfer, but also authorizes someone to make the change on the books of the corporation. I have no such printed form with me, but it is similar in many respects to [56] the ordinary stock assignment form, except that it relates to the bond instead of to the stock certificate.

Q. Then the difference would be simply that the

(Testimony of Francis E. Whitmer.)

assignment you would require in connection with the change of interest in the ownership of these notes would be the fact that the assignment would not be a printed form?

A. Substantially that.

Mr. Horrow: That is all, your Honor.

The Court: Mr. Horrow, Exhibit 2-B on Page 51, Agreement dated May 6, 1930, covering option rights is mentioned. That is not made part of the record in this case, is it, and I was going to ask you whether it was material or not.

Mr. Horrow: It is not material, your Honor. There is a very voluminous agreement covering the option rights and also the mortgages describing the real property that secured these notes. Counsel could not see how they were relevant in these proceedings, and because they were so voluminous we did not want to encumber the record.

The Court: Then, to dispose of the question on this point I would have to ask one other question.

The agreement of May 6, 1930, is not an agreement which relates to the taking over of the notes by the people who are listed in Exhibit 3-C, is that correct?

Mr. Horrow: That is correct. [57]

The Court: Now, was there any agreement of any kind in and of itself under which the people listed on 3-C took over the notes?

Mr. Horrow: There was no written agreement of any kind. It was simply done by payment of a

(Testimony of Francis E. Whitmer.)

sum of money for assignments of interest in these notes together with the mortgages.

The Court: It does seem to me that this question may be made a little difficult by the lack of some documentary evidence on the transaction. It seems a little unusual to me for interest in notes to be acquired with so little formality. I am wondering if Mr. Whitmer in his own records doesn't have something that hasn't been brought out. The notes themselves were assigned to the American Trust Company and I suppose that the attorneys who handled that transaction drew up this list which is Exhibit 3-C, and that might have been done after some closing of the matter when the people listed on Exhibit 3-C made a payment for their interest, but they didn't—then they were asked to execute Exhibit 2-B and, as I understand it, that is all that was done, and, if I were Edith Lamm, and somebody said to me, "Prove to me that you have a 12.157611 interest in these notes for which you paid \$25,000," I would say, "Well, here is my cancelled check. I signed Exhibit 2-B and the attorneys—some representatives of the bank listed my bank on 3-C and that is the evidence." Now, would that be [58] true?

Mr. Horrow: That is generally the evidence that any person of ownership in connection with the registration where the person doesn't have possession of the particular instrument, that is registered. In this case the notes were in the possession of the American Trust Company and the only evidence of ownership which any of these individuals had was

(Testimony of Francis E. Whitmer.)

the record of ownership maintained by the American Trust Company.

The Court: Who prepared Exhibit 3-C?

Mr. Horrow: I have no knowledge as to that, your Honor.

The Court: Do you know who prepared Exhibit 3-C, Mr. Whitmer?

The Witness: I have no direct knowledge on it. It was delivered to us. It was not prepared in our office.

The Court: Just one other question: If Edith Lamm sold W. E. Elliott her interest in the notes, what would happen as far as you were concerned under your duties?

The Witness: I will have to make the assumption of what we do because there were no changes of ownership, but——

The Court: There were no changes. That is an important fact. But I would ask you to describe what you would have done if there had been any changes in ownership and explain, give your reasons to show fully why you would have to do what you say you would do, because there are always practical [59] if not legal reasons for doing things in a certain way.

The Witness: The first evidence of it, I assume, would be some attempt at a transmittal to us of the assignment form showing that Edith Lamm had transferred her interest as evidenced by this list and by the document which she signed over to W. E. Elliott.

(Testimony of Francis E. Whitmer.)

The Court: Now, may I ask you another question there: If some evidence were not presented to you, you would continue to make interest payments to Edith Lamm, wouldn't you?

The Witness: Yes, and also capital.

The Court: Capital payments?

The Witness: Yes.

The Court: So that if W. E. Elliott wanted to receive payments from you he would have to send something or a letter to you, wouldn't he?

The Witness: Together with some kind of documentary evidence showing the transfer from the seller to him of the interest that he was buying.

The Court: All right, now. What would you have required of him to be on the safe side? The Court knows the Trustee was acting as judiciary capacity, have to be very careful. If anything goes wrong, they are liable for it, and the Trust Departments have counsel to advise them on all these things. Now, out of your experience, what would you have [60] required as manager of the Trust Department?

A. A document undertaking to assign the interest of the transferor to the transferee, which would have to satisfy ourselves, would be in sufficient form signed and preferably acknowledged or witnessed by someone whose signature would be acceptable to us.

The Court: Then that assignment form would have to be executed by whom?

The Witness: By the transferor.

(Testimony of Francis E. Whitmer.)

The Court: Edith Lamm?

The Witness: Yes. There are two Edith Lamms, one Mrs. and one Miss.

The Court: Well, we will call it Mrs. Edith Lamm.

The Witness: Then that document would have been put in our vault because it would be an important document. Then the signed counterpart of the letter which had been executed by Mrs. Lamm would be marked to show that her interest had been transferred by an assignment dated whatever the document might bear as date and received by us on another date over to the name of the transferee.

The Court: W. E. Elliott?

The Witness: W. E. Elliott. Then that would accomplish the fact that the documentary file would indicate that transfer. Then a memorandum would have originated from me to Mr. King who was in charge of the bookkeeping department, [61] indicating that by assignment bearing its date Mrs. Edith Lamm had transferred her interest in the Lamm Lumber Company indebtedness over to W. E. Elliott, indicating his address and that all future payments which heretofore would have been made to Mrs. Edith Lamm, by reason of her ownership, should hereafter be made to Mr. Elliott by reason of his ownership.

The Court: What would Mr. King do?

The Witness: Mr. King would take—let me make one more comment. I would have to indicate the

(Testimony of Francis E. Whitmer.)

change likewise, not only on the signed counterpart of the letter of instructions and agreement, but also on this list so that the operating legal file would at all times be correct.

The Court: Be something, in other words, to strike out Mrs. Edith Lamm's name entirely and substitute W. E. Elliott's share to—increasing his percentage interest also, is that right?

The Witness: That is right, and then Mr. King would have made the same change upon the copy that he kept in the Bookkeeping Department and would have had the girl who was the typist in charge of the physical work of making up those disbursements change her card also, showing that Mrs. Lamm was no longer an owner and Mr. Elliott's share had changed from 12 and a fraction per cent to 24 and a fraction per cent.

The Court: Now——

Mr. Horrow: If I can interject there, your Honor— [62] to whom would the payments be made after that change?

The Witness: To the transferee, Elliott, as to that proportion.

The Court: In other words, it was your duty, was it, to make payments only to people whose names appeared on this list of July 1, 1941, which is in evidence in this case as Exhibit 3-C?

The Witness: That is right. The copy that Mr. King kept in his department throughout the administration of the account was kept for that purpose.

(Testimony of Francis E. Whitmer.)

The Court: Is there anything else?

Mr. Horrow: That is all, your Honor.

Mr. Mather: I have a question or two.

Recross-Examination

By Mr. Mather:

Q. Mr. Whitmer, the only documentary evidence that was submitted to you to make the change on Exhibit 3-C, changing Alice McCourt Lamm, natural guardian, to trustee, were the two documents that are now in evidence, Petitioners' Exhibits 5 and 6, is that correct?

A. That is the letter that Mrs. Lamm wrote us, Alice McCourt Lamm telling us that she was a trustee.

Q. And this is 5 and 6?

A. This is the only change that was made except for change in addresses, Mr. Mather. [63]

Q. Those are the only documentary evidence you received in making the change that was made on Petitioners' Exhibit or on Exhibit 3-C?

A. That is right.

Mr. Mather: That is all.

The Court: What is your point there, Mr. Mather?

Mr. Mather: Well, a change was made and that was the documentary evidence that the bank received to make this change.

The Court: Well, how does——

The Witness: Give me an opportunity to explain that.

(Testimony of Francis E. Whitmer.)

The Court: How does that, in your opinion, differ from what Mr. Whitmer has testified to in answer to the Court's questions about how his department would handle an assignment of interest of any one of these original undivided interest-holders?

Mr. Mather: This wasn't an assignment from natural guardian to trustee. I don't know whether she was the natural guardian or she was the trustee. I don't know, but on the Exhibit 3-C that was submitted to the bank they were given a list of participants and their interest. A change was made to one of the participants to whom payment was made upon documentary evidence submitted to the bank, and that is the documentary evidence that was submitted to the bank upon which the change was made. It wasn't an assignment, I don't believe.

The Court: That is all. That is sufficient under [64] the—that is just that kind of a transaction.

Mr. Horrow: I think the witness can explain, your Honor, if I can ask a question or two.

The Court: I would say that Exhibit 6 speaks for itself. You may look at it. As I understand the situation, the list of those who held undivided interests in this indebtedness referred to Alice McCourt Lamm as the natural guardian for Winifred Carol Lamm and Alice McCourt Lamm notified the Trust Department of the American Trust Company that that was in error, that she was trustee and not a natural guardian and asked to have it corrected. Now, I suppose if the bank had wanted her to sub-

(Testimony of Francis E. Whitmer.)

mit more evidence than that letter it would have done so.

What light can you throw on the matter, Mr. Whitmer?

The Witness: Nothing more than the documents appear to offer when she executed the counterpart of a letter of instructions she described herself as natural guardian and then discovered that that wasn't what she meant and wrote us a letter and asked us to change that over to trustee, and indicated where she got the money, and then had the persons who deposited the money with her also approve that change and authorized us to make that change on her counterpart and on the list, which we did.

The Court: Well, Exhibit 5 is dated August 26.

The Witness: That is Mr. Brown's letter, Senior [65] Trust Officer's letter to her calling her attention to the manner of execution.

The Court: Then the letter of August 28, which was Exhibit 6, was sent in reply to Mr. Brown's letter, Exhibit 5, is that right?

The Witness: That is correct.

The Court: Is there anything else?

Mr. Mather: That is all.

Mr. Horrow: No further questions.

The Court: Thank you, Mr. Whitmer, for taking your time to come to give this testimony to the Court, and you are now excused.

(Witness excused.)

The dates for the briefs will be a little longer than is usually set under the rules, because of the holidays. The original briefs of both parties will be due on January 13, and the reply briefs will be due on February 13. Is that satisfactory?

Mr. Horrow: That is agreeable.

Mr. Mather: Yes.

The Court: That concludes the hearing in this proceeding.

(Whereupon, at 11:50 o'clock a.m., the hearing in the above-entitled matter was concluded.) [66]

Certificate

I, William Blashfield, one of the official reporters of The Tax Court of the United States under its reporting contract, assigned to report certain proceedings during the session of The Tax Court in San Francisco, beginning November 7, 1949, do hereby Certify as follows:

That I reported all of the proceedings in the case of Alice McCourt Lamm, et al., Petitioner, Dockets 21724, 21725, 21726, 22126, 22127, 22128, 22129, 22130, 22131, 22132, 22133, 22135, 22136, 22137, and 22138, on November 15, 1949, before the Honorable Marion J. Harron, Judge of The Tax Court;

That I did well and truly, to the best of my ability, record in Stenotypy fully, completely and accurately all of the proceedings which I was as-

signed to report, including all colloquy and statements made during the proceedings, and all questions to and answers given by witnesses;

That my stenotype record is full, complete and accurate; and

That the foregoing record is a true, complete and accurate transcript of my stenotype notes of all the proceedings which I reported, and all of the testimony which was taken in the above-entitled cause.

WILLIAM F. BLASHFIELD,
Recorder.

Filed T. C. U. S. December 12, 1949.

The Tax Court of the United States
T.C. No. 44

ALICE McCOURT LAMM, et al.,¹
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket Nos. 21724, 21725, 21726, 22126, 22127,
22128, 22129, 22130, 22131, 22132, 22133,
22635, 22636, 22637, 22638.
Promulgated September 26, 1950.

FINDINGS OF FACT AND OPINION

Petitioners and others purchased as an investment certain past due notes of a corporation at less

than face value and caused them to be transferred to a Trust Company which, pursuant to an agreement, collected payments made by the debtor and distributed them, less charges, to the purchasers pro rata. The Trust Company maintained the official list of the owners with their addresses and percentage shares and required that any transfer of an interest be evidenced by the filing of an assignment. The debtor paid part of the fee of the Trust Company. Held: The notes were not "in registered form," within the meaning of section 117(f), I.R.C., and the petitioners' gains upon retirement of the notes were not capital gains.

Harry R. Horrow, Esq., and Francis N. Marshall, Esq., for the petitioners.

T. M. Mather, Esq., for the respondent.

The respondent has determined deficiencies in income and victory tax for the year 1943, in each of the proceedings which were consolidated for trial and consideration by the Court, as follows:

¹Consolidated with the proceeding of Alice McCourt Lamm, Docket No. 21724, are the following: Estate of W. E. Lamm, Deceased, Docket No. 21725; Winifred Carol Lamm, Docket No. 21726; Estate of Edith E. Lamm, Deceased, Docket No. 22126; Edith Lamm, Docket No. 22127; Ethel Fisher, Docket No. 22128; Estate of Chas. C. Elliott, Deceased, Docket No. 22129; Estate of Eugene D. Elliott, Deceased, Docket No. 22130; Bess Kent, Docket No. 22131; Joseph S. Kent, Docket No. 22132; Rolland G. Watt and Adele C. Watt, Docket No. 22133; Elsa Ehlers, Docket No. 22635; William E. Elliott, Docket No. 22636; H. Edwin Nowell, Docket No. 22637; and Elizabeth V. Nowell, Docket No. 22638.

Docket No.	Petitioner	Amount of Deficiency
21724	Alice McCourt Lamm	\$4,246.73
21725	Estate of W. E. Lamm, Deceased.....	9,345.83
21726	Winifred Carol Lamm	2,472.21
22126	Estate of Edith E. Lamm, Deceased.....	7,393.25
22127	Edith Lamm	7,487.07
22128	Ethel Fisher	7,012.02
22129	Estate of Chas. C. Elliott, Deceased.....	1,599.01
22130	Estate of Eugene D. Elliott, Deceased.....	1,164.99
22131	Bess Kent	508.54
22132	Joseph S. Kent	437.34
22133	Rolland G. Watt and Adele C. Watt.....	8,478.60
22635	Elsa Ehlers	5,863.86
22636	William E. Elliott	7,292.33
22637	H. Edwin Nowell	261.80
22638	Elizabeth V. Nowell	261.77

Each of the petitioners owned participating interests in notes of the Lamm Lumber Company. In 1943 the notes were retired upon payment of the balance of the principal and interest due thereon; and each of the petitioners realized gains upon the retirement of the notes in amounts proportional to his fractional ownership thereof. Each of the petitioners reported in his return for 1943 the gain realized as long-term capital gain, of which 50 per cent was reported as income. The petitioners contend that the notes in question come within the provisions of section 117(f) of the Internal Revenue Code. The respondent has determined that the notes in question did not come within the provisions of section 117(f) and that, therefore, the gains were taxable as ordinary income rather than as long-term capital gains. The only question to be decided is whether the notes in question came within the scope of section 117(f). The question is common

to all of the proceedings which have been consolidated.

The petitioners filed their income and victory tax returns for the year 1943 with the collectors for the appropriate districts as set forth in the margin.²

Findings of Fact

The facts which have been stipulated are found as facts, and the stipulation is incorporated herein by this reference.

Lamm Lumber Company, a corporation, issued two promissory notes, one dated May 6, 1930, in the principal sum of \$150,000, and one dated September 5, 1930, in the principal sum of \$250,000, both payable to the order of Consolidated Securities Company, hereinafter referred to as "Consolidated," in consideration of loans. Each of these notes was secured by a mortgage on a certain railroad owned by Lamm Lumber Company. On May 26 and September 30, 1930, Consolidated executed respective declarations of trust that it held these notes, mortgages and options for the benefit of Southern Pacific Land Company. Until July 1, 1941, Southern Pacific Land Company was the beneficial owner thereof.

From March 5, 1932, to September 5, 1934, various additional notes were issued by Lamm Lumber

²Docket Nos. 21724, 21725, and 21726, filed with the collector for the District of Oregon; Docket Nos. 22126, 22127, 22128, 22129, 22130, 22635, and 22636, filed with the collector for the Sixth District of California; and Docket Nos. 22131, 22132, 22133, 22637, and 22638, filed with the collector for the First District of California.

Company to Consolidated representing unpaid interest on said corporate indebtedness. On December 24, 1936, Lamm Lumber Company and Consolidated entered into a supplementary agreement compromising the unpaid interest as to its amount, funding the interest and accruals to January 1, 1938, by adding them to the principal, restating the new principal at January 1, 1938, as \$497,845, and providing for interest from January 1, 1938, at 3 per cent. Lamm Lumber Company covenanted to pay monthly \$5 for each car of logs shipped over the railroad with minimum payments of \$15,000 a year until December 31, 1941, and \$35,000 a year thereafter.

On February 8, 1940, Consolidated endorsed all the notes to The Anglo California National Bank of San Francisco, without recourse, and assigned to that bank its rights as mortgagee. Lamm Lumber Company paid \$250 per year service charges to The Anglo California National Bank.

From February 10, 1938, to June 11, 1941, Lamm Lumber Company made various payments on the debt, so that as of June 12, 1941, the sum owing by Lamm Lumber Company thereon was \$411,264.99. All the notes were then on their face past due.

Southern Pacific Land Company was desirous of liquidating its lumber interests in Northern California and Oregon and let it be known that it would be willing to sell its interest in the Lamm Lumber Company notes at a substantial discount. In order to avail themselves of the investment opportunity, certain individuals, including petitioners herein

(petitioners' decedents in the cases of the four estates) each on his or her own behalf, offered to purchase undivided fractional interests in the notes, making in total 100 per cent of the ownership of said notes. These offers were presented to Southern Pacific Company (parent company of Southern Pacific Land Company) on behalf of Southern Pacific Land Company as an offer to purchase the notes for 50 per cent of the balance of the principal of the loan plus the interest currently due at the time of the completion of the purchase. Such offer was accepted, and on July 1, 1941, the individuals paid over to the Southern Pacific Land Company the sum of \$206,388.55, and the beneficial ownership of the notes and mortgages was transferred from Southern Pacific Land Company to the individuals in proportion to their undivided fractional interests.

The purchasers, as beneficial owners of undivided fractional interests in the notes, entered into a written agreement called "Instructions and Agreement," dated July 15, 1941, with American Trust Company, hereinafter referred to as "Trust Company." Each individual signed a counterpart of the agreement stating his or her percentage interest. Also, a list was made of the names, addresses, amounts invested, and percentage interests of the aforesaid beneficial owners which was given to the Trust Company.

Pursuant to the Instructions and Agreement, the notes were endorsed and mortgages assigned to Trust Company to hold and keep in its possession.

The Instructions and Agreement described the

obligation of the Lamm Lumber Company and the document's evidencing it, directed Trust Company to hold certain documents as agent for the joint owners of the notes, and further provided, in part:

You are to receive for the account of the undersigned and as their Agent such payments on account of interest and principal as may be made to you from time to time by Lamm Lumber Company. *** On or within a reasonable time after the 10th day of each September, December, March and June, you are to remit to each of the undersigned a check for his share of the interest payments and separate check for his share of the principal payments, less your charges.

You shall have no duty to take any steps to enforce the collection of said obligation, nor to prevent it or any part of it or any of the notes, mortgages, agreements, or other documents evidencing or modifying it, from outlawing, nor to take any action of any other kind other than as herein specifically set forth, except upon the written instructions of the persons who, at the time, shall be the owners in the aggregate of 75% or more of the entire interest in said obligation, and after the furnishing to you of such indemnity as you shall require, any and all action taken by you pursuant to such instructions shall be your complete acquittance relative thereto.

You shall not be responsible or liable in any manner whatever for the sufficiency, genuineness, or validity of said obligation, or the Mortgages securing the same, or the agreements or assignments, or other documents or instruments, affecting them or

it, or with the respect to their form or execution. You shall be fully protected in acting upon any notice, request, waiver, consent, receipt or other paper or document believed by you to be genuine and to be signed by the proper party or parties. You may advise with legal counsel in the event of any dispute or question as to the construction of these instructions, or your duties thereunder, and you shall incur no liability and shall be fully protected in acting in accordance with the opinion and instructions of such counsel.

* * *

The undersigned agree jointly and severally to indemnify and hold you harmless for all taxes, expenses, costs, demands, claims and liabilities of every kind and character arising out of or in connection with these instructions and the property held hereunder.

All rights and obligations of the undersigned hereunder shall inure to and be binding on their successors in interest which term shall include their heirs, assigns and personal representatives.

You shall not be bound to take notice of any change in the ownerships of the interests of any of the undersigned unless and until there shall have been filed with you such documentary evidence as you shall consider necessary to establish such change.

These instructions may be terminated at any time by the then holders of 100% of the interest in said obligation, but not otherwise. In such event, after the payment or provisions for your compensation

and other charges, the property then held hereunder shall be returned to the undersigned, or their successors in interest, or their order.

When there shall have been paid to you by or on behalf of Lamm Lumber Company in lawful money of the United States sums totaling \$411,264.99, plus simple interest on the decreasing balances at the rate of 3% per annum, you are authorized to cancel all of the notes held by you hereunder, and to return them to Lamm Lumber Company and to execute and deliver to it any and all releases, satisfactions, and other instruments necessary or desirable to evidence the extinguishment of its said obligation.

These instructions may be signed in any number of counterparts with the same effect as though they were one and the same document. They shall not become effective for any purpose unless and until they have been signed by the owners of 100% of the interests in said obligation.

Dated as of July 15, 1941.

The owners of the undivided interests in the notes, the amount which each paid for his or her undivided interest, and the percentage of the total interest which each owned are as follows:

Name	Participation by Each of a Total Sum of \$205,632.50	Percentage of the Total Interest and Principal Belonging to Each
Mrs. Edith Lamm	\$25,000	12.157611
Miss Edith Lamm	25,000	12.157611
Ethel Fisher	25,000	12.157611
W. E. Elliott	25,000	12.157611
Elsa Natalie	20,000	9.726089
W. E. Lamm	16,500	8.024023
R. G. Watt	15,000	7.294567
Alice McCourt Lamm.....	12,000	5.835653
Trustee for Winifred Carol Lamm		

Chas. C. Elliott	8,500	4.133588
Alice McCourt Lamm	8,000	3.890436
E. D. and Beth L. Elliott.....	7,000	3.404131
Joint Tenants		
Joseph S. Kent	5,000	2.431522
H. Edwin Nowell	2,632.50	1.280197
Everitt A. and Lorraine M. Hill	2,000	.972609
Joint Tenants		
C. E. & Manila McClung Matkin	2,000	.972609
Joint Tenants		
S. E. and Ann J. Rife.....	2,000	.972609
Joint Tenants		
W. A. and Edna S. Spangler.....	2,000	.972609
Joint Tenants		
S. W. and Alta J. Egeline.....	2,000	.972609
Joint Tenants		
A. G. Hammond	1,000	.486305
Total.....	\$205,632.50 ³	100.000000

In accordance with the Instructions and Agreement, Trust Company duly remitted collections of interest and principal paid to it by Lamm Lumber Company to those owners shown to be entitled thereto. During this period, none of the individuals sold or exchanged his or her undivided fractional interest in the notes.

Trust Company's charges for its services in collecting and remitting interest and principal payments and in maintaining a record of ownership were shared by the participating owners of record and by Lamm Lumber Company in the following manner: Trust Company charges the sum of \$500 as an acceptance fee, an annual fee of \$100 plus 1/10

³The total amount paid to Southern Pacific Land Company was \$206,388.55. This was slightly in excess of the total amount of the consideration paid by the owners of interests who paid \$205,632.50. The discrepancy is not explained.

of 1 per cent of the unpaid balance of the obligation at the beginning of each year, and \$250 as a closing fee, plus reimbursement for out-of-pocket expenses. Of these charges Lamm Lumber Company agreed by letter dated August 26, 1941, to Trust Company, to pay sums at the rate of \$250 per annum which were credited against the foregoing total charges.

On December 7, 1943, the notes were retired by payment of the balance of the principal and interest due thereon. During the year 1943 petitioners realized gains on the retirement of the notes in amounts proportionate to their fractional ownership thereof.

The Trust Company's procedure in carrying out its duties under the agreement was as follows: A memorandum of instructions was furnished to employees handling the account. The original list of owners of interests was placed in the Trust Company's documentary file. A copy was furnished the bookkeeping department. A card list was prepared and maintained showing the names and addresses of the participants, their percentage shares, and the dates when payments were expected for distribution. On receipt of any installment payment the bookkeepers computed the amount of interest and posted that on a cash ledger sheet, the balance being posted as principal. A computation was then made of the amount of principal and interest to be apportioned to each of the owners on the list and checks were prepared, one for interest and one for princi-

pal, for payment to each of the owners of interests. A statement was prepared for each participant showing the total amount received, the amount divided among the participants and the balance of the principal remaining due. The notes were held by the Trust Company until final payment was received after which they were marked "canceled" and returned to the debtor.

There were no transfers of interests by the owners of the Lamm Lumber Company notes; but had a transfer been made, the Trust Company would have required notice of such transfer and the filing of an assignment, properly witnessed or acknowledged, before remitting any proceeds to the transferee and would have changed its card record and list of owners accordingly, and would have marked the signed counterpart of the agreement to show the transfer.

The Trust Company also acts as a registrar for some issues of corporate securities. In such cases it maintains a card record showing the name of the debtor corporation and the name and address of the registered owner, the card also showing transfers and cancellations and giving a history of the ownership of the particular security.

Opinion

Harron, Judge: The only question in these proceedings is whether the notes of Lamm Lumber Company were in registered form within the mean-

ing of section 117(f) of the Internal Revenue Code.⁴

On and after May 6, 1930, Lamm Lumber Company gave its notes in exchange for loans to Consolidated Securities Company. The petitioners conceded the fact that none of the notes were registered notes at the time of issuance. The narrow question presented is whether the notes were "in registered form" after the petitioners purchased undivided interests in them in 1941.

The evidence in these proceedings is clear on the point that the debtor, Lamm Lumber Company, did not at any time take back any of the notes and re-issue registered notes in place of the original unregistered notes. Section 117(f) refers to the retirement of notes, bonds, debentures, certificates or other evidences of indebtedness issued by any corporation with interest coupons or in registered form. We understand the wording of section 117(f) to refer to evidence of indebtedness which is put into registered form by a debtor-corporation, and that one of the requirements of section 117(f) is that the evidence of indebtedness be put in registered form by the debtor if the retirement of the in-

⁴Sec. 117. Capital Gains and Losses.

* * *

(f) Retirement of Bonds, Etc.—For the purposes of this chapter, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor.

debtedness is to be recognized as an exchange so that gain or loss shall be treated as capital gain or loss.

The petitioners have based their contention that the gains which they realized upon the payment of the notes should be treated as capital gains because of the arrangements which they made with the American Trust Company under the agreement of July 15, 1941. That is to say, the petitioners appear to take the view that the notes were "in registered form" because of the records which were kept for purposes of distributions to them and because any transfers of their respective interests had to be recorded by their agent.

We are unable to agree with the petitioners that the debtor-corporation ever placed the notes in question in registered form. The Lamm Lumber Company was not a party to the agreement with American Trust Company and we think that it involves too strained a construction of the facts to conclude that the agreement between the petitioners and the American Trust Company operated in some way to effect a registration of the notes by the Lamm Lumber Company. The Lamm Lumber Company did not maintain any register of the notes, or of the owners, or of the payments to the owners of undivided interests. The American Trust Company was not an agent of the Lamm Lumber Company. Instead, it was an agent of the petitioners who had purchased the notes at a discount. They appointed the American Trust Company as their agent to receive payments of principal and interest on the notes for them, and to make distributions thereof to them. The

records which the American Trust Company which were kept for the purposes of acting as a collecting and disbursing agent are not the kind of register which satisfies the requirements of section 117(f). Since we cannot agree with the petitioners that the requirements of section 117(f) are satisfied in these proceedings by virtue of the records which the petitioners had their own agents establish, we must sustain the respondent's determination.

The petitioners rely upon *Lurie v. Commissioner*, 156 Fed. (2d) 436, reversing 4 T.C. 1065; and other cases. All of the authorities which have been cited have been considered. In the *Lurie* case, as shown by the Findings of Fact and Opinion of this Court, *supra*, notes were taken back by a corporation and were reissued in the form of registered notes. The debtor-corporation registered the evidences of its indebtedness. That was not the fact with respect to the notes which are involved here. Therefore, we believe that this proceeding is distinguishable from the *Lurie* case.

It is held that the notes of Lamm Lumber Company were not "in registered form" within the requirements of section 117(f) of the Code at any time, either before or after the petitioners acquired their interests therein. The respondent's determinations are sustained.

Reviewed by the Court.

Decisions will be entered for the respondent.

The Tax Court of the United States
Washington

Docket No. 21724

ALICE McCOURT LAMM,

Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion promulgated on September 26, 1950, it is

Ordered and Decided: That there is a deficiency in income and victory tax for the year 1943 in the amount of \$4,246.73.

[Seal] /s/ MARION J. HARRON,
Judge.

Entered Sep. 26, 1950.

Served Sep. 26, 1950.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 21724

ALICE McCOURT LAMM,

Petitioner on Review,

vs.

GEORGE J. SCHOENEMAN, Commissioner of
Internal Revenue,

Respondent on Review.

PETITION FOR REVIEW

To The Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

Now comes Alice McCourt Lamm, by and through her attorneys Harry R. Horrow, Esq., Farncis N. Marshall, Esq., and Claude H. Hogan, Esq., and respectfully shows:

I.

Jurisdiction

The petitioner on review, Alice McCourt Lamm, hereinafter referred to as the "taxpayer," is a resident of Modoc Point, Oregon. The respondent on review, George J. Schoeneman, hereinafter referred to as the "Commissioner," is the duly appointed, qualified and acting Commissioner of Internal Revenue.

The federal income and victory tax return of taxpayer for the calendar year 1943 was filed with the Collector of Internal Revenue for the District of Oregon, whose office is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, wherein this review is sought. Your petitioner seeks a review of the decision of the Tax Court of the United States pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code as amended.

II.

Prior Proceedings

On November 26, 1948, the Commissioner determined a deficiency in income and victory tax for the calendar year 1943 in the amount of \$4,246.73 and sent to the taxpayer by registered mail a notice of said deficiency. Thereafter on February 7, 1949, and within the time prescribed by law, the taxpayer filed a petition with the Tax Court of the United States seeking a redetermination of said deficiency and alleging that there was no deficiency in income tax due from the taxpayer for the year 1943. On or about April 22, 1949, the Commissioner filed his answer to said petition. By order of the Tax Court dated November 15, 1949, this case was consolidated with the cases of other taxpayers whose petitions for review are being filed concurrently herewith. These cases were heard before a division of the Tax Court at San Francisco, California, on November 15, 1949. The Tax Court promulgated its opinion

and entered its decision on September 26, 1950, ordering and deciding that there is a deficiency in income and victory tax for the year 1943 in the amount of \$4,246.73.

III.

Nature of Controversy

Taxpayer was during the calendar year 1943 the owner of an undivided interest in certain notes of the Lamm Lumber Company, an Oregon corporation, which was purchased by her for investment at 50 per cent of its face value. These notes were retired by the Lamm Lumber Company by a payment at full face value on December 7, 1943, and taxpayer thereby realized a gain upon said retirement, represented by the difference between the amount paid for her interest in said notes and the amount received by her. There is no dispute as to the amount of the gain. The sole issue herein presented is whether the gain is taxable as ordinary income, as determined by the Tax Court, or as capital gain, as contended by taxpayer. That issue involves the construction of section 117(f) of the Internal Revenue Code and whether said notes of the Lamm Lumber Company were "in registered form" within the meaning of section 117(f) of the Internal Revenue Code at the time of their retirement. The Tax Court held that the notes were not "in registered form" within the meaning of section 117(f) and that the taxpayer's gain upon the retirement of the notes was not capital gain. If said

notes were "in registered form" within the meaning of section 117(f), said gain is capital gain as contended by taxpayer.

IV.

Assignments of Error

Taxpayer alleges that the Tax Court erred in the following respects:

1. The Tax Court erred in holding that the notes of Lamm Lumber Company were not "in registered form" at the time of their retirement within the meaning of section 117(f) of the Internal Revenue Code.

2. The Tax Court erred in holding that said notes were not "in registered form" within the meaning of said section unless they were issued or reissued in registered form by Lamm Lumber Company.

3. The Tax Court erred in holding that the ownership of the notes of Lamm Lumber Company was not evidenced by a register within the provisions of section 117(f) of the Internal Revenue Code.

4. The Tax Court erred in holding that the agreement of July 15, 1941, with the American Trust Company did not result in the registration of said notes within the provisions of section 117(f) of the Internal Revenue Code.

5. The Tax Court erred in holding that the

Lamm Lumber Company was not a party to said agreement.

6. The Tax Court's holding that American Trust Company was not an agent of Lamm Lumber Company is unsupported by its findings of fact and is erroneous.

7. The Tax Court erred in failing to hold that the notes of Lamm Lumber Company were "in registered form" at the time of their retirement within the meaning of section 117(f) of the Internal Revenue Code.

8. The Tax Court erred in failing to hold that the taxpayer realized a capital gain on the retirement of the notes of Lamm Lumber Company for the year 1943.

9. The Tax Court erred in holding that the taxpayer realized ordinary income on the retirement of the notes of Lamm Lumber Company.

10. The Tax Court erred in determining that there was a deficiency in income and victory tax for the taxpayer for the calendar year 1943 in the amount of \$4,246.73, and in failing to hold that there was no deficiency in said taxes for said year.

11. The Tax Court erred in deciding contrary to law and without support in its findings of fact and the evidence.

Wherefore, petitioner asks that the decision and order of the Tax Court be reversed by the United States Court of Appeals for the Ninth Circuit and

that a transcript of the record be prepared in accordance with law and with the rules of said court and transmitted to the clerk of said court for filing and that appropriate action be taken to the end that the errors complained of may be reversed and corrected by said court.

Dated: San Francisco, California, December 19, 1950.

/s/ HARRY R. HORROW,

/s/ FRANCIS N. MARSHALL,

/s/ CLAUDE H. HOGAN,

Attorneys for Petitioner.

PILLSBURY, MADISON &

SUTRO,

Of Counsel.

Filed T.C.U.S. December 26, 1950.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To George J. Schoeneman, Commissioner of Internal Revenue, Washington, D. C.:

You are hereby notified that Alice McCourt Lamm did on the 26th day of December, 1950, file with the clerk of the Tax Court of the United States, in Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Cir-

cuit of a decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated: San Francisco, California, December 19, 1950.

/s/ HARRY R. HORROW,

/s/ FRANCIS N. MARSHALL,

/s/ CLAUDE H. HOGAN,

Attorneys for Petitioner
On Review.

PILLSBURY, MADISON &
SUTRO,
Of Counsel.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignment of error mentioned therein, is hereby acknowledged this 26th day of December, 1950.

/s/ CHARLES OLIPHANT, JR.,

Attorney for Respondent
On Review.

Filed T.C.U.S. December 26, 1950.

[Title of Court of Appeals and Cause.]

Tax Court Docket Nos. 21724, 21725, 21726, 22126, 22127, 22128, 22130, 22131, 22132, 22133, 22635, 22636, 22637 and 22638.

ORDER

Motion for preparation of the records on review in the above causes and the printing thereof having been made by counsel for the above-named petitioners on review and consented to by counsel for the above-named respondent on review:

It is hereby Ordered:

1. That the certified records to be prepared by the clerk of the Tax Court of the United States in the above cases shall be made upon separate designations for record on review in the usual course and that a complete transcript of record be filed only in the case of *Alice McCourt Lamm v. George J. Schoeneman*, Commissioner of Internal Revenue, T. C. Docket No. 21724, which shall include, inter alia, a copy of the findings of fact and opinion of the Tax Court of the United States in the consolidated causes, a copy of the stipulation of facts together with exhibits attached, filed in the consolidated causes, a copy of the entire transcript of hearing on November 15, 1949, at San Francisco, California, in the consolidated causes, a copy of each of the exhibits introduced in evidence in the consolidated causes, or the original of any exhibit if physical transmission of such exhibit be ordered,

and a copy of the order entered hereon by this court; and that an abbreviated record be filed in all the remaining cases herein, bearing Docket Nos. 21725, 21726, 22126, 22127, 22128, 22129, 22130, 22131, 22132, 22133, 22635, 22636, 22637 and 22638, which shall contain only the following documents: docket entries, petition and answer, order of the Tax Court substituting party petitioner, if any, decision of the Tax Court, petition for review and assignment of errors, notice of filing petition for review, and the designation of the record;

2. That all the cases be docketed in the usual order, but that only the complete record relating to the case of *Alice McCourt Lamm v. George J. Schoeneman*, Commissioner of Internal Revenue, T. C. Docket No. 21724 (including any subsequent documents filed in this case prior to printing), shall be printed and that only said case shall be briefed and presented to the court in argument for decision, but that the matters contained in the abbreviated records of the related cases herein may be referred to by counsel in their respective briefs filed herein and on oral arguments and considered by the court with the same force and effect as if included in the printed record on review herein;

3. That the abbreviated records in the cases bearing T. C. Docket Nos. 21725, 21726, 22126, 22127, 22128, 22129, 22130, 22131, 22132, 22133, 22635, 22636, 22637 and 22638 remain unprinted in the office of the clerk of the reviewing court herein

and that further proceedings thereon be suspended until the judgment of this court is entered in the case of Alice McCourt Lamm v. George J. Schoeneman, Commissioner of Internal Revenue, T. C. Docket No. 21724. Upon the entry of said judgment this court will order similar judgments entered in the causes bearing T. C. Docket Nos. 21725, 21726, 22126, 22127, 22128, 22129, 22130, 22131, 22132, 22133, 22635, 22636, 22637, and 22638;

4. That the clerk of this court transmit two certified copies of this order to the clerk of the Tax Court of the United States at Washington 25, D. C., one of which is to be incorporated by him in the transcript of record on review in the case of Alice McCourt Lamm v. George J. Schoeneman, Commissioner of Internal Revenue, T. C. Docket No. 21724, as certified and transmitted to this court.

Done this 19th day of January, 1951.

WILLIAM DENMAN,
Judge.

ALBERT LEE STEPHENS,
Judge.

WILLIAM E. ORR,
Judge.

A true copy.

Filed T.C.U.S. January 24, 1951.

[Title of Court of Appeals and Cause.]

ORDER FOR PHYSICAL TRANSMISSION
OF EXHIBIT

Upon the stipulation of petitioner and respondent on file herein, and for good cause appearing therefor, it is hereby Ordered that the original of Petitioner's Exhibit No. 8 be incorporated by the Clerk of the Tax Court in the transcript of record on review on this case as certified and transmitted to this court, and that the Clerk of this court transmit two certified copies of this order to the Clerk of the Tax Court of the United States, one of which is to be incorporated by him in the transcript of record on review in this case as certified and transmitted to this court.

Dated: San Francisco, California, January 19, 1951.

WILLIAM DENMAN,

ALBERT LEE STEPHENS,

WILLIAM E. ORR,

Judges of the United States Court of Appeals for
the Ninth Circuit.

A true copy.

Filed T.C.U.S. January 24, 1951.

[Title of Tax Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON REVIEW

To the Clerk of the Tax Court of the United States:

You will please prepare and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit copies duly certified as correct of the entire record in the above-entitled cause, in connection with the petition for review heretofore filed by Alice McCourt Lamm, including the following documents and records:

1. Docket entries of all proceedings before the Tax Court;

2. All pleadings before the Tax Court, including the following:

(a) Petition, including Exhibit A attached thereto;

(b) Request for place of hearing;

(c) Answer; and

(d) Joint motion for consolidation of proceedings;

3. Order of Tax Court granting motion to consolidate proceedings;

4. Stipulation of facts;

5. The entire transcript of hearing November 15, 1949, at San Francisco, California; and

6. All the exhibits in said cause, being:

(a) Petitioner's Exhibit No. 1-A, promissory

notes and mortgage executed by Lamm Lumber Company;

(b) Petitioner's Exhibit No. 2-B, instructions and agreement of noteholders with American Trust Company;

(c) Petitioner's Exhibit No. 3-C, list of owners of notes indicating their fractional interests therein;

(d) Petitioner's Exhibit No. 4-D, letter dated August 26, 1941, addressed to American Trust Company by Lamm Lumber Company;

(e) Petitioner's Exhibit No. 5, copy of letter addressed by the American Trust Company to Alice McCourt Lamm;

(f) Petitioner's Exhibit No. 6, copy of letter dated August 28, 1941, addressed by Alice McCourt Lamm to the American Trust Company;

(g) Petitioner's Exhibit No. 7, copy of internal memorandum of the American Trust Company dated August 27, 1941; and

(h) Original of petitioner's Exhibit No. 8, specimen form of bond of California-Oregon Power Company;

7. Findings of fact and opinion of the Tax Court;

8. Decision of the Tax Court;

9. Petition for review;

10. Notice of filing petition for review;

11. This designation of contents of record on review;

12. Order of United States Court of Appeals for the Ninth Circuit consolidating cases on appeal and directing filing of abbreviated records in certain cases; and

13. Order of United States Court of Appeals for the Ninth Circuit, if any, directing physical transmission of any exhibit as part of the record on review.

/s/ HARRY R. HORROW,

/s/ FRANCIS N. MARSHALL,

/s/ CLAUDE H. HOGAN,

Attorneys for Petitioner.

PILLSBURY MADISON &

SUTRO,

Of Counsel.

Service acknowledged.

Filed T.C.U.S. January 16, 1951.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of the Tax Court of the United States do hereby certify that the foregoing documents, 1 to 15, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation as to Contents of Record on Review" in the proceedings before the Tax Court of the United States entitled: "Alice McCourt Lamm, Petitioner, v. Commissioner of Internal Revenue, Respondent,"

Docket No. 21724, and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 25th day of January, 1951.

/s/ VICTOR S. MERSCH,
Clerk.

[Endorsed]: No. 12828. United States Court of Appeals for the Ninth Circuit. Alice McCourt Lamm, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcription of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed January 29, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket 21724

ALICE McCOURT LAMM,

Petitioner on Review,

vs.

GEORGE J. SCHOENEMAN, Commissioner of
Internal Revenue,

Respondent on Review.

STIPULATION FOR CONSIDERATION OF
EXHIBIT IN FORM AS CERTIFIED

Alice McCourt Lamm, Petitioner, and George J. Schoeneman, Commissioner of Internal Revenue, Respondent, upon the petition on file herein for review of the decision of the Tax Court of the United States, hereby stipulate that petitioner's Exhibit No. 8, specimen form of bond of California-Oregon Power Company, need not be printed as part of the record, but may be considered in the form certified by the Clerk of the Tax Court of the United States, and in such form shall constitute a part of the record on review.

Said exhibit is voluminous and cannot feasibly be reproduced by printing, and for that reason the

printing of said exhibit should be dispensed with.

Dated: December 29, 1950.

/s/ HARRY R. HORROW,

/s/ FRANCIS N. MARSHALL,

/s/ CLAUDE H. HOGAN,

Attorneys for Petitioner.

/s/ THERON L. CAUDLE,

Assistant Attorney General.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of Internal Revenue, Attorneys for Respondent.

[Endorsed]: Filed U.S.C.A. January 19, 1951.

[Title of Court of Appeals and Cause.]

ORDER FOR CONSIDERATION OF EXHIBIT
IN FORM AS CERTIFIED

Upon the stipulation of petitioner and respondent on file herein, and for good cause appearing therefor, it is hereby Ordered that Petitioner's Exhibit No. 8 need not be printed as part of the record but may be considered in the form certified by the Clerk of the Tax Court of the United States, and in such form shall constitute a part of the record on appeal.

Dated: San Francisco, California, January 19, 1951.

/s/ WILLIAM DENMAN,

/s/ ALBERT LEE STEPHENS,

/s/ WM E. ORR,

Judges, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed U.S.C.A. January 19, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

Alice McCourt Lamm, Petitioner herein, makes the following statement of the points on which she intends to rely upon the petition for review herein:

1. The Tax Court erred in holding that the notes of Lamm Lumber Company were not "in registered form" at the time of their retirement within the meaning of section 117(f) of the Internal Revenue Code.

2. The Tax Court erred in holding that said notes were not "in registered form" within the meaning of said section unless they were issued or reissued in registered form by Lamm Lumber Company.

3. The Tax Court erred in holding that the ownership of the notes of Lamm Lumber Company was not evidenced by a register within the provisions of section 117(f) of the Internal Revenue Code.

4. The Tax Court erred in holding that the agreement of July 15, 1941, with the American Trust Company did not result in the registration of said notes within the provisions of section 117(f) of the Internal Revenue Code.

5. The Tax Court erred in holding that the Lamm Lumber Company was not a party to said agreement.

6. The Tax Court's holding that American Trust Company was not an agent of Lamm Lumber Company is unsupported by its findings of fact and is erroneous.

7. The Tax Court erred in failing to hold that the notes of Lamm Lumber Company were "in registered form" at the time of their retirement within the meaning of section 117(f) of the Internal Revenue Code.

8. The Tax Court erred in failing to hold that the taxpayer realized a capital gain on the retirement of the notes of Lamm Lumber Company for the year 1943.

9. The Tax Court erred in holding that the taxpayer realized ordinary income of the retirement of the notes of Lamm Lumber Company.

10. The Tax Court erred in deciding contrary to law and without support in its findings of fact and the evidence.

Dated, San Francisco, California, February 5, 1951.

/s/ HARRY R. HORROW,

/s/ FRANCIS N. MARSHALL,

/s/ CLAUDE H. HOGAN,

Attorneys for Petitioner
On Review.

[Endorsed]: Filed U.S.C.A. February 6, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD
NECESSARY FOR CONSIDERATION

Alice McCourt Lamm, Petitioner herein, designates as necessary for the consideration of the points relied on:

1. The whole of the record certified by the Clerk of the Tax Court of the United States;
2. Stipulation for consideration of exhibit in form as certified;
3. Order for consideration of exhibit in form as certified.

Dated, San Francisco, California, February 5, 1951.

/s/ HARRY R. HORROW,

/s/ FRANCIS N. MARSHALL,

/s/ CLAUDE H. HOGAN,

Attorneys for Petitioner
On Review.

[Endorsed]: Filed U.S.C.A. February 6, 1951.

No. 12,828

IN THE

United States Court of Appeals
For the Ninth Circuit

ALICE McCOURT LAMM,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

HARRY R. HORROW,

FRANCIS N. MARSHALL,

CLAUDE H. HOGAN, JR.,

THOMAS E. HAVEN,

225 Bush Street, San Francisco 4, California,

Attorneys for Petitioner.

FILED

APR 17 1951

PAUL A. O'HARNEY

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No. 12,828

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ALICE MCCOURT LAMM,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

Petitioner filed her income and victory tax return for the calendar year 1943 with the Collector of Internal Revenue for the District of Oregon (R. 20). On November 26, 1948, respondent mailed to petitioner a notice of deficiency in income and victory taxes for the year 1943 in the amount of \$4,246.73 (R. 21-22). Petitioner filed with the Tax Court a petition for a redetermination, asserting that there was no deficiency (R. 5-10). On September 26, 1950, the Tax Court rendered its decision sustaining the Commissioner's determination of deficiency, and entered decision accordingly (R. 131, 146). The petition for review in this court was filed December 26, 1950 (R. 147, 152).

This court has jurisdiction under the provisions of sections 1141 and 1142 of the Internal Revenue Code.

THE STATUTE INVOLVED.

The statute involved is section 117(f) of the Internal Revenue Code, which defines capital gains and losses in part as follows:

“Sec. 117. Capital Gains and Losses.

* * *

(f) Retirement of Bonds, Etc.—For the purposes of this chapter, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor.”

STATEMENT OF THE CASE.

The question in this case¹ is whether corporate notes, which were retired with resultant gain to the owners, were “in registered form” within the meaning of section 117(f) of the Internal Revenue Code, so as to permit the owners to treat their gain as a capital gain for income tax purposes rather than as ordinary income as the Commissioner determined. The Tax Court held that the statute requires corporate notes, in order to come within its terms,

¹The case is one of fifteen cases, identical in substance and arising out of the same transaction, which are here together on review of the Tax Court decisions therein. By order of this court (R. 154-156), abbreviated records have been filed in the other cases, to which reference may be made in the briefs and arguments; and upon entry of the judgment of this court in this case, this court will order similar judgments entered in the other cases.

In this brief, where necessary to a complete picture of the facts, we shall refer to the taxpayers and petitioners in all the cases collectively.

to be put into registered form *by the debtor corporation*, and that the debtor corporation did not do so here. The taxpayers, on this review of the Tax Court's ruling, contend that the Tax Court erred both in its construction of the law and in its interpretation of the facts; in other words, that the only requirement of the law is that the ownership of the notes be registered, regardless of who may take the action registering them; but that even if the law did require action by the debtor corporation, the latter sufficiently participated in the registering transaction in this case.

The issue is further narrowed by reference to what is already settled. (These matters will, of course, be properly considered in the body of this brief, but an understanding of what is, and what is not, in controversy will be helpful in the reading of the facts.) First, corporate notes, to come within the statute, need not be originally issued in registered form; it is enough that they are registered at the time of their retirement (*Lurie v. Commissioner of Internal Revenue* (9 Cir. 1946) 156 F.2d 436). Second, "in registered form" is meaningless except as it relates to an instrument which *is registered*—i.e., its ownership entered in a register; in other words, the phrase refers to the condition of the instrument rather than to any particular words in the body of it. The register need not be maintained by the debtor corporation. In accordance with these principles, and with the basic purpose of the statute, it is the taxpayers' contention that what was done here fully satisfied the language and the purpose of the statute, both as self-evident and as disclosed by the *Lurie* and other cases.

The facts as stated below are stipulated (R. 19 et seq) :

On May 6, 1930, and on September 5, 1930, respectively, Lamm Lumber Company, a corporation, issued two promissory notes in the respective principal sums of \$150,000 and \$250,000, payable to the order of Consolidated Securities Company, hereinafter referred to as "Consolidated," in consideration of loans from the latter in those two sums (R. 23). Each of the notes (R. 29, 31) was secured by a mortgage on a certain railroad owned by Lamm Lumber Company, and as part of the same transactions, Lamm Lumber Company gave options to Consolidated to purchase the railroad in preference to any other purchaser on the same terms (R. 23-24). On May 26th and September 30, 1930, Consolidated executed respective declarations of trust that it held the notes, mortgages and options for the benefit of Southern Pacific Land Company, and at all times prior to July 1, 1941, Southern Pacific Land Company was the beneficial owner of the notes, mortgages and options (R. 24).

From March 5, 1932, to September 5, 1934, various additional notes (R. 33-47) were issued by Lamm Lumber Company to Consolidated representing unpaid interest on the corporate indebtedness (R. 24). On December 24, 1936, Lamm Lumber Company and Consolidated entered into a supplementary agreement (R. 48-55) reciting the indebtedness and mortgages, compromising the unpaid interest as to its amount, funding the interest and accruals to January 1, 1938, by adding them to the principal, restating the new principal at January 1, 1938, as \$497,845, and stating interest from January 1, 1938, to be 3 per cent (R. 24). Lamm Lumber Company, the obligor, covenanted

to pay monthly \$5 for each car of logs shipped over the railroad with minimum payments of \$15,000 a year until December 31, 1941, and \$35,000 a year thereafter, the payments to be first applied on interest and then on principal (R. 24).

On February 8, 1940, Consolidated endorsed to The Anglo California National Bank of San Francisco all of the promissory notes, without recourse, and assigned to that bank its rights as mortgagee (R. 24-25).

At various times from February 10, 1938, to June 11, 1941, Lamm Lumber Company made payments on the debt in accordance with the agreement of December 24, 1936, so that as of June 12, 1941, the sum owing by Lamm Lumber Company to Southern Pacific Land Company was \$411,264.99. All of the notes were then on their face past due (R. 25).

For some time prior to July 1, 1941, Southern Pacific Land Company had been desirous of liquidating its lumber interests in Northern California and Oregon and let it be known that it would be willing to sell its interest in the Lamm Lumber Company notes at a substantial discount. In order to avail themselves of the investment opportunity thus presented, certain individuals, including petitioners herein (petitioners' decedents in the cases of the four estates) each on his or her own behalf, offered to purchase at the proffered discount undivided fractional interests in the notes, making in total 100 per cent of the ownership of the notes. These offers were presented to Southern Pacific Company (parent company of Southern Pacific Land Company) on behalf of Southern Pacific Land Company as an

offer to purchase the total ownership of the notes for a sum amounting to 50 per cent of the balance of the principal of the loan plus the interest currently due at the time of the completion of the purchase. This offer was subsequently accepted by Southern Pacific Company on behalf of Southern Pacific Land Company, and on July 1, 1941, these individuals paid over to Southern Pacific Land Company the various amounts agreed to be paid by them for the purchase of the undivided fractional interests and totaling the sum of \$206,388.55, and the beneficial ownership of the notes and mortgages was transferred from Southern Pacific Land Company to the individuals in proportion to their undivided fractional interests (R. 25-26).

The individuals, as beneficial owners of the undivided fractional interests in the notes by virtue of the purchase related above, entered into a written agreement called "Instructions and Agreement" (R. 55-62), dated July 15, 1941, with American Trust Company, hereinafter referred to as "Trust Company" (R. 26). In executing the agreement each of the individuals signed an individual counterpart, stating therein his or her percentage interest in the notes. Contemporaneously with the delivery of the Instructions and Agreement to Trust Company, the individuals delivered to Trust Company a list (R. 63-64) of the names, addresses, amounts invested, and their percentage interests (R. 26).

Pursuant to the Instructions and Agreement, the notes were endorsed, and the mortgages assigned, to Trust Company to hold and keep in its possession in accordance with the instructions contained in the Instructions and Agreement (R. 26-27).

In accordance with the Instructions and Agreement, Trust Company duly remitted collections of interest and principal paid to it by Lamm Lumber Company to those owners shown to be entitled thereto in accordance with the ownership interests set forth in the list. During this period, none of the individuals sold or exchanged his undivided fractional interest in the notes. In several instances, however, certain owners changed their addresses, informing Trust Company of the change, and Trust Company thereupon mailed its remittances to the new addresses (R. 27).

Trust Company's charges for its services in collecting and remitting interest and principal payments and in maintaining a record of ownership were shared by the participating owners of record and by Lamm Lumber Company in the following manner: As agreed in the Instructions and Agreement, Trust Company charged the sum of \$500 as an acceptance fee, an annual fee of \$100 plus $\frac{1}{10}$ of 1 per cent of the unpaid balance of the obligation at the beginning of each year, and \$250 as a closing fee, plus reimbursement for out-of-pocket expenses. Of these charges Lamm Lumber Company agreed by letter (R. 64-65) dated August 26, 1941, to Trust Company to pay sums at the rate of \$250 per annum which were credited against the foregoing total charges (R. 27). In the same letter the Lamm Lumber Company instructed the Trust Company to compute and pay interest on the basis of 365 days per year instead of following the customary banking practice of using 360 days (R. 64-65).

On December 7, 1943, the notes were retired by payment of the balance of the principal and interest due thereon.

During the year 1943 petitioners realized gains on the retirement of the notes in amounts proportionate to their fractional ownership thereof (R. 27).

The gains realized by petitioners were reported in their income and victory tax returns for the calendar year 1943 as long-term capital gains, of which 50 per cent were reported as income (R. 27).

The Commissioner determined deficiencies against each of the petitioners, upon the basis that the gains were taxable as ordinary income, i.e., in their full amount (R. 133). The petitioners duly petitioned for a redetermination of the deficiencies (R. 22), and the Tax Court consolidated the various cases for trial and opinion (R. 67). The facts were for the most part stipulated, but additional testimony was received. The Tax Court entered findings and an opinion (R. 131)² sustaining the Commissioner's determinations of deficiency, and entered decisions accordingly (R. 146). The cases are here on the taxpayers' petitions for review.

The oral evidence consisted of the testimony of the trust officer of the Trust Company. In particular, his testimony brought out that the Trust Company looked to the list of ownerships as establishing the owners from time to time of the notes, and the proportions of their ownership, so as to determine to whom and in what amounts all payments of interest and principal should go. After showing, chiefly in response to questions by the Court, that a transfer of ownership would be recognized only upon receipt of documentary evidence consisting of an assignment properly

²Reported, 15 T.C. 305.

witnessed or acknowledged, followed by a change of the Trust Company's card record and a corresponding change of the list of ownerships, the trust officer testified (R. 126):

“The Court: In other words, it was your duty, was it, to make payments only to people whose names appeared on this list of July 1, 1941, which is in evidence in this case as Exhibit 3-C?

The Witness: That is right.”

The foregoing statement sets out the basic facts and points of controversy between the parties. More detailed reference to particular facts will appear where pertinent in the course of the argument.

SPECIFICATION OF ERRORS RELIED UPON.

Petitioner relies upon the following errors:

The Tax Court erred:

1. In failing to hold that the notes of Lamm Lumber Company were “in registered form” at the time of their retirement within the meaning of section 117(f) of the Internal Revenue Code.

2. In holding that said notes were not “in registered form” within the meaning of said section unless they were issued or reissued in registered form by Lamm Lumber Company.

3. In holding that the ownership of the notes of Lamm Lumber Company was not evidenced by a register within the provisions of section 117(f) of the Internal Revenue Code.

4. In holding that the agreement of July 15, 1941, with the American Trust Company did not result in the registration of said notes within the provision of section 117(f) of the Internal Revenue Code.

5. In holding that the Lamm Lumber Company was not a party to said agreement.

6. In holding that American Trust Company was not an agent of Lamm Lumber Company.

7. In holding that the taxpayers realized ordinary income on the retirement of the notes of Lamm Lumber Company, and in failing to hold that the taxpayer realized a capital gain on the retirement of said notes.

8. In determining that there was a deficiency in income and victory tax for the taxpayer for the calendar year 1943 in the amount of \$4,246.73, and in failing to hold that there was no deficiency in said taxes for said year.

SUMMARY OF ARGUMENT.

Basic principles already settled point the solution of this case. The decision of this court in *Lurie v. Commissioner of Internal Revenue* (9 Cir. 1946) 156 F.2d 436, makes it clear that the law concerns itself only whether the securities are registered at the time of their retirement, without regard to how or when or by whom they become registered.

The only requirement of the law is that the securities be registered,—i.e., having their ownership entered in a register or list which governs payment of principal and

interest. The law does not distinguish between *kinds* of registers. The register which was kept here, and which determined to whom payments were made, met every requirement of the statute. The Trust Company treated it as a register of owners and of ownership interests, to be kept by it as such.

It is stipulated that the taxpayers purchased the notes for investment. They realized a gain through increase of the debtor corporation's ability to pay,—an appreciation of the value of their capital investment. This is the essence of a capital gain and met the basic purpose of the statute in differentiating securities for long-term investment from those representing ordinary commercial transactions. The Tax Court further erred in holding that the statute requires the securities to be put into registered form by the debtor corporation; but even if there were such a requirement, the debtor corporation sufficiently participated in this case.

ARGUMENT.

PRELIMINARY UNDERLYING PRINCIPLES:

- (1) IT IS NOT NECESSARY THAT THE INSTRUMENTS BE ISSUED IN REGISTERED FORM.
- (2) "IN REGISTERED FORM" SIMPLY MEANS ENTERED IN A REGISTER, SO AS NOT TO BE TRANSFERABLE OR PAYABLE EXCEPT THROUGH THE REGISTER.
- (3) IT IS NOT NECESSARY FOR THE DEBTOR CORPORATION TO MAINTAIN THE REGISTER.
- (4) THE PURPOSE OF "WITH INTEREST COUPONS OR IN REGISTERED FORM" IS TO DIFFERENTIATE FOR CAPITAL GAINS TAX TREATMENT THE LONG-TERM INVESTOR FROM THE ORDINARY CREDITOR OR SHORT-TERM SPECULATOR.

Preliminarily, there are certain settled principles which underlie the precise issue.

First: It is not necessary that instruments be *issued* in registered form. They can be put into registered form later and still be entitled to the benefits of section 117(f), if a gain is realized upon retirement. This court definitely so decided in *Lurie v. Commissioner of Internal Revenue* (9 Cir. 1946) 156 F.2d 436, saying (p. 437):

"Respondent contends that, because the notes were not issued in registered form, they did not come within subsection (f). The Tax Court did not so hold, nor is there any basis for such a holding. To come within subsection (f), a note must be issued by a corporation and, unless it is a coupon note, must be in registered form at the time of its retirement, but it need not be in registered form at the time of its issuance."

Second: "In registered form" is meaningless except as it means an instrument which *is* registered. It may perhaps include, but is not to be confused with, the idea of

“registrable form”—i.e., one which *may become* registered. The *Lurie* case shows that an instrument which is in fact registered at the time of its retirement is what is embraced within the section. The usual corporate bond, for example, may be issued to bearer and later registered at the bearer’s request (R. 117-118), although other bonds in the series are not registered (*Benwell v. Mayor, etc., of City of Newark* (1897) 55 N.J.Eq. 260, 36 Atl. 668, 670; Hoagland, *Corporation Finance*, 3d Ed., 1947, p. 184).

Third: It is not necessary for the debtor corporation to maintain the register. Usually a bank or trust company acts as registrar (Munn, *Encyclopedia of Banking and Finance*, 5th Ed., 1949, p. 585; Bonneville and Dewey, *Organizing and Financing Business*, 3d Rev. Ed., 1946, p. 137)—as in this case.

Fourth: The recognized purpose of the qualifying phrases “with interest coupons or in registered form” is to differentiate corporate securities which are held for true investment purposes from those which are held simply as evidence of a debtor-creditor relationship or for short-term speculation or trading. Taxation of long-term investments accords them the benefit of capital gains tax treatment. Corporate obligations which are registered or bear interest coupons are the kinds which taxpayers usually acquire and hold for investment purposes. The court recognized this purpose in *McClain v. Commissioner of Internal Revenue* (5 Cir. 1940) 110 F.2d 878, affirmed (1941) 311 U.S. 527, where the court said (110 F.2d 878):

“The corporate paper described as registered or bearing coupons is intended for long time investment. The effect of the provision is to make the retirement of

it by the maker equivalent for tax purposes to a sale of it to another, and the necessary consequence is that it falls under the capital assets provisions of Sec. 117(a) and (d), and if it has been held more than a year a loss cannot be taken into account at 100 per cent, and the limitation of capital net losses to \$2,000 will apply.”

It is noteworthy that this capital gains tax treatment works both ways; i.e., the long-term capital investor is taxed upon only 50 per cent of his capital gain, but also gets credit for only 50 per cent of his capital loss (subject to further limitation as to the total allowable capital losses—sec. 117(d)(2)). This is in contrast to corporate notes held merely as evidence of a debtor-creditor relationship, which, when retired, give rise to a gain or loss taxed or credited at 100 per cent under the ordinary income tax provisions.

When the loss aspect of section 117(f) is considered, it is apparent that Congress meant to include within the meaning of the section notes such as are involved here. Section 117(f) was enacted in 1934, a time when defaults on corporate obligations were much more common than to-day. Until the enactment of this section, taxpayers were allowed to deduct the entire loss resulting when a corporation redeemed its obligation for less than the amount paid for it. In substance, as the court said in the *McClain* case, there is no difference as far as the taxpayer is concerned whether he sells the security or redeems it with the issuing corporation, and it was the intent of Congress that the two transactions receive the same treatment taxwise. See *S. C. Thomson* (1939) 40 B.T.A. 60, 62-63, rev. (2 Cir.

1940) 108 F.2d 642, which was reversed sub nom. *McClain v. Commissioner* (1941) 311 U.S. 527; *Rieger v. Commissioner of Internal Revenue* (6 Cir. 1943) 139 F.2d 618, 621.

These basic principles show that it is the condition or status in which the notes are held—not the form in which they are issued—that determines whether they are “in registered form” within the meaning and purpose of section 117(f). This status is important only from the holder’s standpoint—which is logical, since it is the gain or loss to the holder that is in question. It is the holder who benefits from registration in guarding against loss or theft of the instrument—which is the entire object of registration. It is the holder who bears the attendant disadvantage of registration, i.e., the impairment of negotiability. The fact that the notes are registered, and not who initiates or accomplishes registration, is what is important.

FIRST: THE ESSENTIAL CHARACTERISTIC OF REGISTRATION IS THE MAINTENANCE OF A REGISTER OF THE OWNERSHIPS OF SECURITIES, WHICH DETERMINES TO WHOM PAYMENTS SHALL BE MADE AND UPON WHICH ANY CHANGE OF OWNERSHIP IS NOTED.

As shown above, “in registered form” means entered in a register. This type of registration is, after all, merely a system of handling, developed for the purpose of protecting the security owner against the consequences of loss or theft of the security. It also serves the purpose of permitting the security owner to receive payments upon the security (e.g., of interest) without having to present the security. To effect these purposes a “reg-

ister," or list, of the owners of the securities—those who desire the advantages of registration—is maintained, with provision that the debtor corporation shall make payments to those owners whose names are shown upon the list.

Negotiability is thus impaired to a certain extent; i.e., the transferee of a registered security must show to the keeper of the register satisfactory evidence of the transfer and must have the register changed so as to show him as the current owner of the registered security. See:

6A Fletcher, Corporations (1950), p. 13;

Montgomery, Financial Handbook (1925), pp. 575, 1136.

As the Tax Court said in *Matilda S. Puelicher* (1946) 6 T.C. 300, 303:

"The phrase 'in registered form' implies, at least, that the owner of the instrument is listed in a register maintained for that purpose and that its negotiability is impaired to the extent of the necessity for changing the registration to indicate the change of ownership."

SECOND: WHAT WAS DONE IN THIS CASE MET ALL THE ESSENTIAL REQUIREMENTS OF REGISTRATION. THE NOTES WERE, THEREFORE, "IN REGISTERED FORM" AT THE TIME OF THEIR RETIREMENT, AND THE GAIN REALIZED THEREFROM BY THE TAXPAYERS WAS A CAPITAL GAIN.

The taxpayers were not the business creditors of the debtor corporation, nor were they short-term speculators; they were investors in the notes as a form of corporate security on which they hoped to realize a gain, by buying and holding till retired. They made a capital

investment, and they realized a hoped-for gain through the appreciation of that capital investment. This is the very essence of a capital gain as contemplated by the tax structure.

These facts are stipulated. Paragraph VI of the stipulation of facts stated (R. 25):

*“In order to avail themselves of the investment opportunity thus presented [i.e., by the previous note owner’s willingness to sell the notes at a substantial discount], certain individuals, including petitioners herein * * * offered to purchase at the proffered discount undivided fractional interests in said notes, * * *. Such offer was subsequently accepted * * *.”*

When the notes were delivered to the Trust Company, “said individuals delivered to the Trust Company a list of the names, addresses, *amounts invested*, and percentage interests of said individuals” (Stipulation of Facts, par. 7; R. 26)

—the very list which the Trust Company thereafter maintained as its master list of the note owners, and thereafter “duly remitted collections of interest and principal paid to it by Lamm Lumber Company to those owners shown to be entitled thereto in accordance with the ownership interests set forth in said Exhibit 3-C” (Stipulation of Facts, par. 8; R. 27).

The statutory requirement that a register be set up was fully met. The taxpayers handed over to the Trust Company the corporate notes with instructions and a list of the ownerships of the various interests in the notes. The Trust Company checked the list to make sure that it was in correct form to control the making of payments

on the notes,³ and thereafter remitted interest and principal as received "to those owners shown to be entitled thereto in accordance with the ownership interests set forth" in the list (R. 27).

In the ordinary case of a registered bond, change of ownership would entail bringing in the bond to the registrar, with documentary evidence of the transfer of ownership (usually in the form of the registered owner's signature to an assignment form), and requesting a change of the register to show the new ownership. Here the first step was obviated by the act of turning the notes physically over to the Trust Company to hold. The second step—documentary evidence of transfer—was contemplated in the instructions and agreement exactly as in the ordinary case; the instructions provided (R. 61):

"You shall not be bound to take notice of any change in the ownerships of the interests of any of the undersigned unless and until there shall have been filed with you such documentary evidence as you shall consider necessary to establish such change."

The third element—the register—was kept by the Trust Company just as in the case of an ordinary registered security. The Trust Company took the list of ownerships and from it made up a set of cards, one for each owner, showing the amount of his interest, etc. Payments on the notes were thereafter made according to the card record, checked back against the list (R. 91, 95-96).

³It was not. After correspondence with one of the purchasers of the notes, the trust officer of the Trust Company corrected the list by changing the designation of such purchaser from "Natural Guardian" to "Trustee" for Winifred Carol Lamm (R. 86-89).

In the ordinary case of a registered bond, the same procedure in substance would occur. To illustrate this procedure, petitioners introduced in evidence a sample form of corporate bond (Pet. Exh. 8; R. 119), which provided in the usual language (R. 119) as regards transfer (R. 117-118):

“* * * this bond may from time to time be registered as to principal in the holder’s name * * *

* * * * *

‘After such registration no further transfer of this bond shall be valid unless made on said books by the registered owner in person or by an attorney duly authorized and similarly noted hereon, but this bond may be discharged from registry by being in like manner transferred to bearer.’ ”

The trust officer of the Trust Company testified (R. 118-119):

“To what has ‘registration on said books’—to what does that refer?

A. Well, the only registration books that we ultimately keep are the cards. Those are the lists from time to time—or those are the cards from which the lists of registered owners are made and those cards are kept by us on behalf of the various corporations we represent of the various issues.”

The lack of any requirement that any notation of registration appear on the instruments themselves is clear from the testimony of the trust officer of the Trust Company in answer to questions of counsel and of the court. To effect a transfer, he testified that an assignment in general form transferring the ownership, properly witnessed or acknowledged, would have been acceptable (R. 120). The court pursued this line of inquiry (R. 123-126):

"The Court: Just one other question: If Edith Lamm sold W. E. Elliott her interest in the notes, what would happen as far as you were concerned under your duties?

The Witness: I will have to make the assumption of what we do because there were no changes of ownership, but——

The Court: There were no changes. That is an important fact. But I would ask you to describe what you would have done if there had been any changes in ownership and explain, give your reasons to show fully why you would have to do what you say you would do, because there are always practical if not legal reasons for doing things in a certain way.

The Witness: The first evidence of it, I assume, would be some attempt at a transmittal to us of the assignment form showing that Edith Lamm had transferred her interest as evidenced by this list and by the document which she signed over to W. E. Elliott.

The Court: Now, may I ask you another question there: If some evidence were not presented to you, you would continue to make interest payments to Edith Lamm, wouldn't you?

The Witness: Yes, and also capital.

The Court: Capital payments?

The Witness: Yes.

The Court: So that if W. E. Elliott wanted to receive payments from you he would have to send something or a letter to you, wouldn't he?

The Witness: Together with some kind of documentary evidence showing the transfer from the seller to him of the interest that he was buying.

The Court: All right, now. What would you have required of him to be on the safe side? The Court knows the Trustee was acting as judiciary [in a fidu-

ciary] capacity, have to be very careful. If anything goes wrong, they are liable for it, and the Trust Departments have counsel to advise them on all these things. Now, out of your experience, what would you have required as manager of the Trust Department?

A. A document undertaking to assign the interest of the transferor to the transferee, which would have to satisfy ourselves, *would be in sufficient form* signed and preferably acknowledged or witnessed by someone whose signature would be acceptable to us.

* * * * *

The Witness: Then that document would have been put in our vault because it would be an important document. * * *

* * * * *

The Witness: * * * Then a memorandum would have originated from me to Mr. King who was in charge of the bookkeeping department, indicating that by assignment bearing its date Mrs. Edith Lamm had transferred her interest in the Lamm Lumber Company indebtedness over to W. E. Elliott, indicating his address and that all future payments which heretofore would have been made to Mrs. Edith Lamm, by reason of her ownership, should hereafter be made to Mr. Elliott by reason of his ownership.

The Court: What would Mr. King do?

The Witness: Mr. King would take—let me make one more comment. I would have to indicate the change likewise, not only on the signed counterpart of the letter of instructions and agreement, but also on this list so that the operating legal file would at all times be correct.

The Court: Be something, in other words, to strike out Mrs. Edith Lamm's name entirely and substitute

W. E. Elliott's share to—increasing his percentage interest also, is that right?

The Witness: That is right, and then Mr. King would have made the same change upon the copy that he kept in the Bookkeeping Department and would have had the girl who was the typist in charge of the physical work of making up those disbursements change her card also, showing that Mrs. Lamm was no longer an owner and Mr. Elliott's share had changed from 12 and a fraction per cent to 24 and a fraction per cent.

* * * * *

The Court: *In other words, it was your duty, was it, to make payments only to people whose names appeared on this list of July 1, 1941, which is in evidence in this case as Exhibit 3-C?*

The Witness: *That is right.* The copy that Mr. King kept in his department throughout the administration of the account was kept for that purpose" (emphasis added).

It is of the greatest significance that the Trust Company itself considered and treated the list of ownerships as a register, which in itself absolutely controlled the payment of interest and principal on the notes. The testimony just quoted makes this fact clear beyond dispute. Moreover, when counsel for the Commissioner asked the direct question of the trust officer of the Trust Company (R. 102-103):

"Q. (By Mr. Mather): * * *

Do you know whether these promissory notes were in registered form?

* * * * *

A. * * * They were not coupon instruments but they were registered, every one of them was registered to a particular payee.”

The foregoing demonstrates, we submit, that the Tax Court erred in deciding (R. 144-145):

“The records which the American Trust Company which [sic] were kept for the purposes of acting as a collecting and disbursing agent are not the *kind* of register which satisfies the requirements of section 117(f)” (emphasis added).

The statute does not differentiate between *kinds* of registers. All it requires is that the security be registered at the time of retirement. No particular formality is specified or intimated. Actually the authorities establish that all kinds of registration, of the most informal types, are embraced within the statute.⁴

In a further aspect the Tax Court erred in its understanding of the status of the Trust Company. By no means was the arrangement the mere establishment of an agency for collection of amounts due the various purchasers of the notes, revocable at the will of any one of

⁴*Rieger v. Commissioner of Internal Revenue* (6 Cir. 1943) 139 F. 2d 618 (claim certificates issued by state superintendent of banks showing right to deposits with insolvent bank); *Edith K. Timken* (1946) 6 T.C. 483 (notes of reorganized bank given in exchange for claim certificates); *Estate of Clara E. Martin* (1946) 7 T.C. 1081 (certificate issued by building and loan association with passbook attached providing for variation in amounts on deposit); *Commissioner of Internal Revenue v. Caulkins* (6 Cir. 1944) 144 F.2d 482 (certificates of Investors Syndicate); *Howard Carleton Avery* (1949) 13 T.C. 351 (certificates of a cemetery association).

them who might change his mind. The instructions and agreement expressly provided (R. 61):

“These instructions may be terminated at any time by the then holders of 100% of the interest in said obligation, but not otherwise.”

In other words, the consent of every one of the holders of the notes was required in order to revoke the arrangement—a binding condition far more consonant with registration than with a mere agency for collection.

THIRD: THE TAX COURT ERRED IN HOLDING THAT EVIDENCE OF INDEBTEDNESS, TO COME WITHIN SECTION 117(f), MUST BE PUT INTO REGISTERED FORM BY THE DEBTOR CORPORATION.

The Tax Court erred fundamentally in holding that a registered corporate security, to come within section 117(f), must be put into registered form *by the debtor corporation*. The debtor corporation has no interest in the question. The interest is that of the holder, who if he is a true investor and intends to hold the security as an investment may well wish the safeguards and convenience of registration. If a group of holders wish to establish a register for the safe and effective handling of their holdings, there is nothing in the statute to exclude such action—*unless* the words “in registered form” are tied to and are a qualification of the words “issued by any corporation,” rather than to the list of instruments themselves—bonds, debentures, stocks, etc. But this court has already shown (*Lurie v. Commissioner of Internal Revenue*, supra (9 Cir. 1946) 156 F.2d 436) that the

words in question do *not* qualify or limit the word “issued,” since this court expressly held in that case that securities, to come within the statute, need not be *issued* in registered form. This holding gives logic and grammatical consistency to the statute, recognizing that the entire phrase “with interest coupons or in registered form,” set off by commas from the words preceding, relates to the list of securities—“bonds, debentures, notes,” etc. Had it been intended that the phrase should be a limitation upon the words “issued by any corporation,” it would not have been set off from the words it was supposed to qualify or limit.

The statute, thus construed by this court in the *Lurie* case, pays no heed to how, or when, or by whom, the securities became registered. Its concern is solely: Were the securities registered at the time of their retirement?

The error of the Tax Court is not only one of grammar, but it is also one of substance. It seeks to stress the act of the debtor corporation as the important factor. But, as we have seen, it is the security holder’s standpoint that is important.

Also as we have seen, it is possible for a registered security to be transformed into a bearer instrument by assignment in blank, and then to be reconverted into a registered security by any subsequent holder through the simple expedient of requesting the registrar to register it. This can take place without any intervening act of the debtor corporation; it can be a transaction simply between the holder and the registrar. The same is true of a bond originally issued as a bearer bond, which can

be subsequently registered by the bearer through the registrar without any further action on the part of the debtor corporation.

FOURTH: EVEN IF THE STATUTE REQUIRED THAT THE INSTRUMENTS BE PUT INTO REGISTERED FORM BY THE DEBTOR CORPORATION, HERE THE CORPORATION SUFFICIENTLY PARTICIPATED TO SATISFY THE REQUIREMENT.

If it were necessary under the statute that the instruments be put into registered form by the debtor corporation (which we have seen is *not* required by either the grammar of the section or by the theory of it), in this case the Lamm Lumber Company sufficiently participated to satisfy the requirements. There is no question that the entire transaction was accomplished with full knowledge and approbation of the Lamm Lumber Company, for it wrote a letter to the Trust Company (Exh. 4-D; R. 64-65) in which it made plain reference to the new ownership of the obligation and agreed to pay the Trust Company a part of the cost of its services, stating that the participants in ownership should pay the balance. In this letter, also, the Lamm Lumber Company instructed the Trust Company to compute interest on the basis of 365 days per year in lieu of the customary banking practice of computing interest on 360 days per year—a fact important as showing that the Trust Company was acting, to some extent at least, as agent of the lumber company as well as (for some purposes) agent of the security owners. There was no reason, of course, why the Trust Company could not or should not act as agent, for correlative purposes, of both the debtor corporation and the purchasers of the notes; and the payment arrangements

and the directions given by the lumber company to the Trust Company show plainly that it was doing so.

The question is concluded by the stipulated fact that "Trust Company's charges for its services in collecting and remitting interest and principal payments *and in maintaining a record of ownership were shared* by the participating owners of record and by *Lamm Lumber Company * * **" (emphasis added) (Stipulation of Facts, par. 9; R. 27).

The debtor corporation was not, therefore, merely playing the part of acquiescence; in what the Trust Company did, it served the debtor corporation and acted on its behalf.

CONCLUSION.

For each of the foregoing reasons, we respectfully submit that the judgment of the Tax Court was erroneous and should be reversed.

Dated: San Francisco, California,
April 17, 1951.

Respectfully submitted,

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No. 12828

In the United States Court of Appeals
for the Ninth Circuit

ALICE McCOURT LAMM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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FILED

MAY 31 1951

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OPINION BELOW

The only previous opinion in the present case is that of the Tax Court (R. 131-145), which is reported in 15 T. C. 305.

JURISDICTION

This petition for review (R. 147-152) involves federal income and victory taxes for the year 1943. The taxpayer filed her income and victory tax return for the year 1943 with the Collector of Internal Revenue for the District of Oregon. (R. 20, 133, 134.) On November 26, 1948, the Commissioner mailed to the taxpayer a notice of deficiency in income tax in the amount of \$4,246.73. (R. 11-14.) Within 90 days thereafter,

and on February 7, 1949, the taxpayer filed a petition with the Tax Court for a redetermination of the deficiency under the provisions of Section 272 (a) (1) of the Internal Revenue Code. (R. 3, 5-14.) The decision of the Tax Court that there was a deficiency in income and victory taxes for the year 1943 in the amount of \$4,246.73 was entered on September 26, 1950. (R. 146.) The case is brought to this Court by a petition for review filed on December 26, 1950 (R. 4, 147-152), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

This Court entered an order on January 24, 1951, that the decisions in fourteen related cases which had been consolidated with the instant case for trial before the Tax Court (R. 132) should be controlled by the decision in this case (R. 154-156).

QUESTION PRESENTED

A group of individuals, including the taxpayer, purchased at a substantial discount some promissory notes which were then past due. Inasmuch as the face amounts of the notes did not correspond with the amounts contributed by the individuals, the latter entered into a written agreement with a trust company whereby the notes were endorsed and delivered to the trust company which, in consideration of a fee, agreed to collect the interest and principal on the notes and to pay the proper proportion to each member of the group. The maker of the notes was not a party to the agreement; there was no notice on the face of each note that it might be registered, nor was there any space for the name of the registered owner. When the notes were redeemed, the taxpayer realized a gain which she treated on her tax return as a capital gain. The

Commissioner, on the other hand, determined that it was ordinary income. The question presented is:

Whether the notes were “in registered form” so that their retirement was controlled by Section 117 (f) of the Internal Revenue Code.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 117. CAPITAL GAINS AND LOSSES.—

* * * *

(f) *Retirement of Bonds, Etc.*—For the purpose of this chapter, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor.

* * * *

(26 U. S. C. 1946 ed., Sec. 117.)

STATEMENT

The facts, some of which were stipulated (R. 19-65) and incorporated in the findings of fact (R. 134), are substantially as follows (R. 23-28):

On May 6, 1930, and on September 5, 1930, respectively, Lamm Lumber Company, a corporation, issued two promissory notes in the respective principal sums of \$150,000 and \$250,000, payable to the order of Consolidated Securities Company (hereinafter referred to as Consolidated) in consideration of loans from the latter in those two sums. Each of the notes was secured by a mortgage on a certain railroad owned by Lamm Lumber Company, and as part of the same trans-

actions, Lamm Lumber Company gave options to Consolidated to purchase the railroad in preference to any other purchaser on the same terms. On May 26, 1930, and September 30, 1930, Consolidated executed respective declarations of trust that it held the notes, mortgages and options for the benefit of Southern Pacific Land Company (hereinafter called Land Company), and at all times prior to July 1, 1941, Land Company was the beneficial owner of the notes, mortgages and options. (R. 23-24.)

From March 5, 1932, to September 5, 1934, various additional notes were issued by Lamm Lumber Company to Consolidated representing unpaid interest on the corporate indebtedness. On December 24, 1936, Lamm Lumber Company and Consolidated entered into a supplementary agreement reciting the indebtedness and mortgages, compromising the unpaid interest as to its amount, funding the interest and accruals to January 1, 1938, by adding them to the principal, restating the new principal at January 1, 1938, as \$497,845, and stating interest from January 1, 1938, to be 3%. Lamm Lumber Company, the obligor, covenanted to make minimum payments of \$15,000 a year until December 31, 1941, and \$35,000 a year thereafter, the payments to be first applied on interest and then on principal. (R. 24.)

On February 8, 1940, Consolidated endorsed to the Anglo California National Bank of San Francisco (hereinafter called Anglo) all of the promissory notes, without recourse, and assigned to Anglo its rights as mortgagee. (R. 24-25.)

At various times from February 10, 1938, to June 11, 1941, Lamm Lumber Company made payments on the debt in accordance with the agreement of December 24, 1936, so that as of June 12, 1941, the sum owing by Lamm Lumber Company to Land Company was \$411,-

264.99. All of the notes were then on their face past due. (R. 25.)

For some time prior to July 1, 1941, Land Company had been desirous of liquidating its lumber interests in northern California and Oregon and let it be known that it would be willing to sell its interest in the Lamin Lumber Company notes at a substantial discount. In order to avail themselves of the investment opportunity thus presented, certain individuals, including the taxpayer, each on his or her own behalf, offered to purchase at the proffered discount undivided fractional interests in the notes, making in total 100% of the ownership of the notes. These offers were presented to Southern Pacific Company (parent of Land Company) on behalf of Land Company as an offer to purchase the total ownership of the notes for a sum amounting to 50% of the balance of the principal of the loan plus the interest currently due at the time of the completion of the purchase. This offer was subsequently accepted by Southern Pacific Company on behalf of Land Company, and on July 1, 1941, the individuals, including the taxpayer, paid over to Land Company the various amounts agreed to be paid by them for the purchase of the undivided fractional interests and totaling the sum of \$206,388.55, and the beneficial ownership of the notes and mortgages was transferred from Land Company to the individuals in proportion of their undivided fractional interests. (R. 25-26.)

The individuals, as beneficial owners of the undivided fractional interests in the notes by virtue of the purchase, entered into a written agreement called Instructions and Agreement, dated July 15, 1941, with American Trust Company (hereinafter referred to as Trust Company). In executing the agreement each of the individuals signed an individual counterpart thereof, stating his or her percentage interest in the notes. Con-

temporarily with the delivery of the Instructions and Agreement to Trust Company, the individuals delivered to Trust Company a list of the names, addresses, amounts invested, and percentage interests of the individuals. (R. 26.)

Pursuant to the Instructions and Agreement, the notes were endorsed, and the mortgages assigned, to Trust Company to hold and keep in its possession in accordance with the instructions contained in the Instructions and Agreement. (R. 26-27.)

In accordance with the Instructions and Agreement (Ex. 2-B; R. 55-62) Trust Company duly remitted collections of interest and principal paid to it by Lamm Lumber Company to those owners shown to be entitled thereto in accordance with their ownership interests. During this period, none of the individuals sold or exchanged his undivided fractional interests in the notes. In several instances, however, certain owners changed their addresses, informing Trust Company of the changes, and Trust Company thereupon mailed its remittances to the new addresses. (R. 27.)

The Trust Company's charges for its services in collecting and remitting interest and principal payments and in maintaining a record of ownership were shared by the participating owners of record and by Lamm Lumber Company in the following manner: As agreed in the Instructions and Agreement, Trust Company charged the sum of \$500 as an acceptance fee, an annual fee of \$100 plus $\frac{1}{10}$ of 1% of the unpaid balance of the obligation at the beginning of each year, and \$250 as a closing fee, plus reimbursement for out-of-pocket expenses. Of these charges Lamm Lumber Company agreed by letter dated August 26, 1941, to Trust Company to pay sums at the rate of \$250 per annum which were credited against the foregoing total charges. (R. 27.)

On December 7, 1943, the notes were retired by payment of the balance of the principal and interest due thereon. During the year 1943 the taxpayer realized a gain in the amount of \$7,951.76 on the retirement of the notes. (R. 13, 28.)

The above-mentioned gain of the taxpayer was reported in her income and victory tax return for the calendar year 1943 as a long-term capital gain, of which 50% was reported as income. (R. 13, 28.) The Commissioner determined a deficiency of \$4,246.73 on the ground that the notes were not at the date of retirement in registered form within the meaning of Section 117 (f) of the Internal Revenue Code and therefore the gain was not taxable as a long-term capital gain but was taxable as ordinary income. (R. 12-13, 28.) The taxpayer, along with most of the other owners of undivided interests in the notes, appealed to the Tax Court, which, in a decision reviewed by the court, held that the notes were not in registered form within the meaning of Section 117 (f) of the Internal Revenue Code at any time, either before or after the taxpayer acquired her interest in them. (R. 3, 145.)

SUMMARY OF ARGUMENT

The sole question in this case is whether the thirteen promissory notes were in registered form within the meaning of Section 117 (f) of the Internal Revenue Code, and the answer may best be found by examining the notes themselves. Such an examination shows that they do not have on their face a notice to the holder that they might be registered, and that they do not have on either face or back the name of the registered owner. Therefore they are not in registered form.

While there are no authorities directly in point, there is at least one analogous case decided by the Second Circuit which supports the decision of the court below.

The case decided by this Court upon which the taxpayer relies differs substantially from the present case. In fact, in that case there was no dispute that the notes were in registered form; it was merely a question of whether the statute required them to be in registered form for a period of 18 months. The taxpayer relies strongly upon the contract between the Trust Company and the group of individuals, including the taxpayer, who purchased the notes. Since the face amounts of the various notes did not correspond with the amounts contributed by the various members of the group, the obvious purpose of the agreement was to arrange for the collection of interest and principal of the notes and for the payment of the proportionate amounts to the various members of the group. The agreement clearly shows that the Trust Company was the agent for the note holders and not for the maker, and the Tax Court so found.

ARGUMENT

The Thirteen Promissory Notes, in Which the Taxpayer Had an Undivided Fractional Interest, Were Not in Registered Form Within the Meaning of Section 117 (f) of the Internal Revenue Code

The question in this case is whether the gain which the taxpayer realized upon the retirement of the notes in question, in which she had an undivided fractional interest, was capital gain or ordinary income. The retirement of the notes is not an exchange (*Fairbanks v. United States*, 306 U. S. 436) of property unless the notes may be said to fall within the terms of Section 117 (f) of the Internal Revenue Code, *supra*, which provides in part that for the purpose of the income tax, amounts received by the holder upon the retirement of notes "in registered form" shall be considered as amounts received in exchange therefor. Therefore, the only question in this case is whether the notes were in registered form under the statute.

The thirteen promissory notes involved in this case (R. 29-48, 56) may be divided into two groups: (a) the two principal notes aggregating \$400,000, face value (R. 29-33), which were past due when the group, including the taxpayer, acquired them on July 1, 1941 (R. 25, 26), and (b) the interest notes, aggregating \$65,875, face value (R. 33-48), which were demand notes.

An example of the first group follows (R. 29-31):

~~EXHIBIT 1A~~

\$150,000.00

Modoc Point, Oregon, May 6th, 1930.

For value received, Lamm Lumber Company, an Oregon corporation, promises to pay to Consolidated Securities Company, a California corporation, or order, at the office of The Anglo & London Paris National Bank of San Francisco, in the City and County of San Francisco, State of California, One Hundred and Fifty Thousand (150,000) Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of five and one-half ($5\frac{1}{2}$) per centum per annum from date until paid. The interest herein provided for shall be paid semi-annually from date hereof, and said principal of this note shall be payable in installments of not less than Fifty Thousand (50,000) Dollars. The first of said installments is due and payable May 1, 1934, and a like installment at the end of each and every one year period thereafter until the whole of said principal sum of One Hundred and Fifty Thousand (150,000) Dollars shall have been fully paid. If any of said payments of either principal or interest is not paid when due, the whole of said principal sum and interest shall become immediately due and collectible at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, or any interest thereon, the said Lamm Lumber Company promises to pay such additional sum as the court may adjudge reasonable as attorneys' fees in said suit or action. The entire unpaid principal, or any portion thereof, may, at the option of Lamm Lumber Company, be paid at any time before maturity.

LAMM LUMBER COMPANY,
By W. E. LAMM,

President.

Attest:

J. S. KENT,

[SEAL]

Secretary.

May 26, 1930,

Interest in the amount of \$452.00 on this note is waived due to delayed payment of principal by Consolidated Securities Company; May 6, 1930, to May 26, 1930, twenty days, at $5\frac{1}{2}\%$.

THE ANGLO & LONDON PARIS NATIONAL
BANK OF SAN FRANCISCO,
R. R. ZELLYCK.

Interest Payments.

11/6/30—\$36.73.

5/6/31— 41.25.

11/6/31— 41.25.

February 23, 1940

Without recourse, pay to the order of The Anglo California National Bank of San Francisco.

CONSOLIDATED SECURITIES COMPANY,
By H. L. MACHEN,
Vice President,

[SEAL] By I. M. OTTO,
Assistant Secretary.

July 9, 1941

Without recourse, pay to the order of The American Trust Company.

THE ANGLO CALIFORNIA NATIONAL
BANK OF SAN FRANCISCO,
By FRED V. VOLLMER,
Vice President,

By R. A. HOLMBERG,
Ass't Sect'y.

An example of the second group (the demand notes) follows (R. 33-34):

March 5th, 1932

\$6,875.00

For value received, Lamm Lumber Company, an Oregon corporation, promises to pay, on demand, to Consolidated Securities Company, a California corporation, or order, at The Anglo California National Bank of San Francisco, San Francisco, California, Six Thousand Eight Hundred and Seventy-five (6,875.00) Dollars, in lawful money

of the United States of America, with interest in like money at the rate of $5\frac{1}{2}$ per cent per annum from date until paid.

In case suit or action is instituted to collect this note, or any portion thereof, or interest thereon, said Lamm Lumber Company promises to pay such additional sum as the court may adjudge reasonable attorneys' fees in said suit or action.

LAMM LUMBER COMPANY,
By W. E. LAMM,
President.

Attest:

J. S. KENT,
Its Secretary.

February 23, 1940

Without recourse, pay to the order of The Anglo California National Bank of San Francisco

CONSOLIDATED SECURITIES COMPANY,
By H. L. MACHEN,
Vice President.

By I. M. OTTO,
Assistant Secretary.

July 9, 1941

Without recourse, pay to the order of American Trust Company.

THE ANGLO CALIFORNIA NATIONAL
BANK OF SAN FRANCISCO,
By FRED V. VOLLMER,
Vice President.

By R. A. HOLMBERG,
Assistant Secretary.

It is obvious that these notes are not in registered form because they do not have on their face a notice to the holder that they might be registered, and they do not have on their face or back the name of the registered owner. See *Gerard v. Helvering*, 120 F. 2d 235 (C.A. 2d). In that case where the taxpayer lent a corporation a sum of money, taking a bond and mortgage in the usual form, and no provision was made for registering

any transfer of the bond, and there was no stipulation that the bond could be transferred only by registry or other entry upon the books of the mortgagor, the court held that the bond was not in registered form. The court said (p. 236):

The purpose is to protect the holder by making invalid unregistered transfers, and the bond always so provides upon its face. * * *

In the present case if the notes had been stolen from the Trust Company and subsequently had come into the hands of a *bona fide* purchaser, there is no question but that he could have recovered from the maker, Lamm Lumber Company. On the other hand, if the notes had in fact been in registered form (*Benwell v. Newark*, 55 N. J. Eq. 260, 263, 36 Atl. 668, 669), the maker of the notes would have had a good defense against a *bona fide* purchaser who did not have a formal assignment from the registered owner. See *Read v. Lehigh Valley R. R. Co.*, 284 N. Y. 435, 31 N.E. 2d 891; *First Nat. Bank v. Mayor and City Council*, 27 F. Supp. 444 (Md.), affirmed, 108 F. 2d 600 (C.A. 4th). Once the notes were put in registered form, the maker need recognize only the registered owner, or his assignee, even if the notes were lost. See *Novoprutsky v. Morris Plan Co.*, 319 Pa. 97, 179 Atl. 218.

In *Avery v. Commissioner*, 111 F. 2d 19, decided by this Court, which involved the question whether a gain realized upon the maturity of a ten-year endowment policy was a capital gain or ordinary income, this Court pointed out the limitations of Section 117 (f) of the Revenue Act of 1934, c. 277, 48 Stat. 680 (which corresponds to Section 117 (f) of the Internal Revenue Code) and said (p. 23):

However this may be, it should be noted that Section 117 (f) is not all-inclusive. For example, it is limited to evidence of indebtedness of a *corporation*, and further limited to evidence of indebtedness of a corporation "*with interest coupons or in registered form.*" (Emphasis supplied.)

In *Lurie v. Commissioner*, 156 F. 2d 436, decided by this Court, there was no dispute between the parties that the notes were in registered form at the time they were retired; the only question was whether, in order to get the benefit of treating the gain on retirement as a capital gain under Section 117 (f) of the Revenue Act of 1938, c. 289, 52 Stat. 447, it was necessary for the notes to be in registered form for a period of 18 months. On the face of each note was printed the following (*Lurie v. Commissioner*, 4 T.C. 1065, 1066):

Notice to Holder: This note may be registered as provided on the back hereof * * *.

and on the back thereof:

This note may be registered in the holder's name upon a register to be maintained by the Company at its office in San Francisco, California. Such registration shall be noted on this note by the company, after which no transfer hereof shall be valid unless made on said register and noted on this note. The Company may deem and treat the person in whose name this note is from time to time registered as the absolute owner hereof for the purpose of receiving payments of principal and interest due hereon and for all other purposes.

(Registration)

Notice to Holder: Do not write on this note. Consult the Company for method of transferring registration.

Date of Registry _____.

In Whose Name Registered _____.

Register

Hilton Hotel Company of California,

By _____,

Authorized Officer.

In the present case, to repeat what was said above, there is no notice to the holder upon the face or back of the note that the note may be registered, nor is there any space for the name of the registered owner, the date of registry or the name of the registrar. In this respect the notes here differ materially from those in the *Lurie* case, *supra*, and also from Petitioner's Exhibit 8,¹ the *specimen* bond, which states on its face that it may be registered and has a space of about 8¾ inches by 7 inches in which the names of the respective registered owners and the respective dates of registry may be shown.

In *Rieger v. Commissioner*, 139 F. 2d 618 (C.A. 6th), relied upon by the taxpayer (Br. 23), it appeared that there was printed on the face of the certificate a provision that no assignment would be recognized in payment of dividends unless notice was given to the Superintendent of Banks of Ohio and entered upon his books before such dividends were declared, and there was on the back of the certificate an assignment form similar to that generally used in connection with the transfer of stock certificates, under which was space for the acceptance of the assignment by the Superintendent of Banks of Ohio. There were no similar provisions printed on the notes in this case. In *Commissioner v. Caulkins*, 144 F. 2d 482 (C.A. 6th) (Pet. Br. 23), there was no dispute that the certificate was in registered form. The remaining cases cited by the taxpayer (Br. 23) are decisions of the Tax Court which differ substantially from this case. However, if they are con-

¹ Upon stipulation of the parties and order of this Court, Petitioner's Exhibit 8 was not printed, but may be considered in the form certified by the Clerk of the Tax Court. (R. 162-163.) It may be noted that Petitioner's Exhibit 8 is not in any way directly involved in this case and is not a specimen of an obligation of the maker of the notes in this case. Moreover, it has coupons attached, which is not true of any of the notes in this case. (R. 29-48.)

sidered to be similar, they were in effect overruled by the decision of the same tribunal in the present case.

The principal evidence upon which the taxpayer relies to show that the notes were in registered form is the contract or agreement between the Trust Company and each member of the group who purchased the notes in 1941. (R. 55-62.) The face amounts of the various notes (R. 56) did not correspond with the amounts contributed by the various members of the group (R. 63-64). The obvious purpose of the agreement was to arrange for the collection of interest and principal of the notes and for the payment of proportionate amounts to the various members of the group. It provides in part (R. 57-58) :

The undersigned, joint owners of said obligation in the fractional interests indicate below have caused the above described notes to be endorsed and delivered to you, and have caused The Anglo-California National Bank of San Francisco to execute and deliver to you an "Assignment of Mortgages" dated July 9, 1941, *to be held by you as our Agent* and subject to the provisions of this Agreement. The undersigned have caused an unrecorded agreement covering "Option Rights" dated May 6, 1930, between Lamm Lumber Company and Consolidated Securities Company to be assigned to you likewise *to be held by you as our Agent* and subject to the provisions of this Agreement.

* * * * *

You are to receive for the account of the undersigned and *as their Agent* such payments on account of interest and principal as may be made to you from time to time by Lamm Lumber Company. * * *. On or within a reasonable time after the 10th day of each September, December, March and June, you are to remit to each of the undersigned a check for his share of the interest payments and

separate check for his share of the principal payments, less your charges.

* * * * *

[Italics supplied.]

These provisions support the conclusion of the Tax Court that the Trust Company was an agent of the group, including the taxpayer, which purchased the notes at a discount, and not an agent of the Lamm Lumber Company. (R. 144-145.) Lamm Lumber Company was not a party to the agreement with the Trust Company, and the only relationship between the two was that it offered to contribute \$250 per year to the fees for the services rendered by the Trust Company. There is nothing to show that this contribution was a legal obligation; it was purely vountary as far as the record shows. The taxpayer argues that the Trust Company was acting, to some extent, as agent of the Lamm Lumber Company because the Trust Company was instructed by the Lamm Lumber Company to compute interest on the basis of 365 days per year instead of 360 days per year. (Br. 26.) The letter in question (R. 64-65) shows that the Lamm Lumber Company made a suggestion and asked the Trust Company for a reply; the last line of the letter reads, "May we hear from you on these details?" The letter sounds more like a friendly suggestion than an instruction by a principal.

The taxpayer argues that under Section 117 (f) it is not necessary that the security be placed in registered form *by the debtor corporation*. (Br. 24-26.) We assume that when Congress used the words "in registered form" in the statute, it intended that the ordinary meaning of that term should apply. The ordinary meaning of that term is that the evidence of indebtedness "can be transferred only by an entry on the books

of the debtor corporation". *Benwell v. Newark*, 55 N. J. Eq. 260, 263, 36 Atl. 668, 669. See also *First Nat. Bank v. Mayor and City Council*, 27 F. Supp. 444, 450 (Md.), affirmed, 108 F. 2d 600 (C.A. 4th).

The taxpayer also argues that the purpose of Section 117 (f) was to differentiate between securities held for investment purposes and those which are held for short-term speculation or trading, and to treat gains from the former as capital gains. (Br. 13.) Since eleven of the notes in this case were demand notes and the other two were past due when the group, including the taxpayer, acquired them (R. 25, 56), they could have been paid immediately; that does not tend to show a long-term investment on the part of the group, including the taxpayer, which purchased the notes.

The Tax Court was clearly correct in holding that the notes here were not in registered form within the meaning of the statute. It may be noted that the decision was reviewed by the court. (R. 145.)

CONCLUSION

The decision of the Tax Court is correct and should therefore be affirmed.

Respectfully submitted,

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MORTON K. ROTHSCHILD,

Special Assistants to the Attorney General.

MAY, 1951.

No. 12,828

IN THE

United States Court of Appeals
For the Ninth Circuit

ALICE McCOURT LAMM,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

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FILED

JUN 14 1957

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CLERK

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IN THE
United States Court of Appeals
For the Ninth Circuit

ALICE McCURT LAMM,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

The statement of facts in the respondent's brief generally follows the Stipulation, except in one significant particular. Like the Tax Court's findings of fact, the brief copies most, but not all, of the sentences at the beginning of paragraph 8 of the Stipulation of Facts (R. 27). The Tax Court copied only so much (R. 140) :

“In accordance with the Instructions and Agreement, Trust Company duly remitted collections of interest and principal paid to it by Lamm Lumber Company to those owners shown to be entitled thereto.”

The respondent's brief added :

“in accordance with their [sic] ownership interests.”

The significant words, however, were omitted by both :

“* * * Trust Company duly remitted collections of interest and principal * * * to those owners shown to

be entitled thereto in accordance with *the* ownership interests *set forth in said Exhibit 3-C''* (R. 27),

—i.e., the list kept by the Trust Company as a master record of ownerships governing the payments, as made from time to time, of principal and interest on the notes. Why these stipulated words were omitted in both the Tax Court's and the respondent's statement of facts we cannot guess, but it is obvious that these words, together with the uncontradicted testimony (R. 126), expresses the essential fact of the case, clearly establishing that the Trust Company and all other parties considered, treated, and acted upon the list as a controlling register of the owners of the notes and the extent of their ownership interests.

The Government's brief makes no serious effort to support the ground of the Tax Court's decision, namely, the theory that corporate notes must be placed in registered form *by the debtor corporation* in order to come within section 117(f) of the Internal Revenue Code. That ground our opening brief showed to be erroneous (Petnr.Op.Br. pp. 24-26), and the Government has apparently abandoned it. Respondent's only comment on this contention (Br. for Resp. pp. 17-18) is to refer to a supposed "ordinary meaning" of the term "in registered form" as being that the evidence of indebtedness "can be transferred only by an entry on the books of the debtor corporation." While this doubtless is the form of some registry transactions, others very commonly take the form in which a bank or trust company acts as the registrar and keeps the register, and the debtor corporation's books show only the amount of the outstanding issue or obligation (as here)—(see authorities cited in the Opening Brief, p. 13).

In place of the Tax Court's theory, the Government now contends that the notes were not in registered form because "they do not have on their face a notice to the holder that they might be registered, and that they do not have on either face or back the name of the registered owner. Therefore they are not in registered form" (Br. for Resp. p. 7).

In plain language, respondent's contention is that to be "in registered form," the notes *must* have written on them either (a) a statement that they *might* be registered, or (b) the name of the registered owner—though admitting that no case so holds (Br. for Resp. p. 7). Nor, we submit, does the statute so hold. The statute says "in *registered* form," not "in *registrable* form," as respondent's first alternative would suggest. The point of the statute is that the instrument must be *registered in fact*, not merely declaratively registrable.

Nor is there any requirement that the name of the registered owner appear on the instrument—and in this case in particular such an attempt would be a useless complexity if ever there was one. There were thirteen notes, and nineteen separate investor interests, including several joint tenancies and fiduciary relationships (R. 139-140). The notes themselves were endorsed and delivered to the Trust Company, with the list of ownerships. To have inscribed this entire roster of owners, with their proportionate interests, on each of the notes *when the notes themselves were held by the Trust Company* would serve no purpose whatever. The Trust Company kept the list and made its payments in strict accordance with it; and those facts served every possible purpose of registration. To argue that, in addition, the whole list had to be written

upon every note is, we submit, to go to the extreme in urging an idle act.

Respondent argues, however, that some such notation on the face of the instrument is essential in order to protect the holder, which is the purpose of registration (Br. for Resp. pp. 12-13)—citing *Gerard v. Helvering* (2 Cir. 1941) 120 F.2d 235, and going on to argue that a bona fide purchaser from a thief of the notes would be able to recover from the maker because of the absence of such notation here. Respondent's whole emphasis in this discussion is upon the supposed requirement of the notice to possible transferees, so as to protect the holder. As above mentioned and as further shown below, there was no such necessity here because the notes were in the hands of the registrar itself. The dictum in the *Gerard* case, which apparently dealt with the type of corporate bonds which otherwise can be passed from hand to hand, has no bearing upon the very different situation which exists here. The applicable rule and authority, which respondent ignores in its brief, is that of the Tax Court in *Matilda S. Puelicher* (1946) 6 T.C. 300, 303, quoted in our opening brief (p. 16) which shows that the basic requirement is the listing of ownerships in a register maintained for that purpose, and impairment of negotiability to the extent of requiring a change in the registration to indicate the change of ownership.

In this connection, it may be noted that respondent is wrong in suggesting (Br. for Resp. p. 13) that in the absence of notation upon the notes themselves, a bona fide purchaser would be able to recover from the maker if the notes had been stolen (citing no authority). The

notes were indorsed to the Trust Company, "and the indorsement of such indorsee is necessary to the further negotiation of the instrument."

Uniform Negotiable Instruments Act,¹ sec. 34;
Cal. Civ. Code, sec. 3115.

Thus, in order to negotiate the notes, if stolen, it would be necessary to forge the Trust Company's indorsement, and

"When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, *or to enforce payment thereof against any party thereto, can be acquired through or under such signature*, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority" (emphasis added).

Uniform Negotiable Instruments Act, sec. 23;
Cal. Civ. Code, sec. 3104.²

¹This Act is in force in all 48 states, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

²To the same effect are:

Austell Bank v. National Bondholders Corp. (1939) 188 Ga. 757, 4 S.E.2d 913, 914;

Fourth Nat. Bank v. Lattimore (1929) 168 Ga. 547, 148 S.E. 396, 398;

Hayes v. Midland Credit Co. (1928) 173 Minn. 554, 218 N.W. 106;

Oil State Refining Co. v. Bryant (1925) 110 Okl. 83, 236 Pac. 431, 434;

Borserine v. Maryland Casualty Co. (8 Cir. 1940) 112 F.2d 409, 415;

National Metropolitan Bank v. Realty Appraisal & Title Co. (App.D.C. 1931) 47 F.2d 982, 984;

Security-First Nat. Bk. v. Bk. of America (1943) 22 Cal.2d 154, 157, 137 P.2d 452;

Anglo-California Trust Co. v. French American Bk. (1930) 108 Cal.App. 354, 357, 291 Pac. 621.

In this case any notation on the notes showing that they were registered would have been superfluous, since the owners did not have possession of the notes and therefore could not negotiate them without the Trust Company's knowledge. Furthermore, as the notes were overdue they were no longer negotiable, so that they could not fall into the hands of a holder in due course, and the equities of the owners could not be lost.³

Respondent's efforts to answer the opening brief center in two contentions: That the Trust Company was the mere collecting agent for the taxpayers and not the agent of the Lumber Company (Br. for Resp. pp. 16-17), and

³Although eleven of the notes were payable on demand, the latest of the eleven was issued on September 5, 1934.

"Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course."

Uniform Negotiable Instruments Act, sec. 53;

Cal. Civ. Code, sec. 3134.

In *McAdam v. Grand Forks Mercantile Co.* (1913) 24 N.D. 645, 140 N.W. 725, the court said (p. 727):

"There is no question that the note under consideration was past due, both when purchased by Valley and when purchased by the plaintiff. It was a demand note, dated January 16, 1904. It was purchased by the plaintiff on March 6, 1905. It is well established that a note payable on demand is due within a reasonable time after its date, and there are practically no authorities which hold that such reasonable time can be extended beyond a year."

Accord:

State & City Bank & Trust Co. v. Hedrick (1930) 198 N.C. 374, 151 S.E. 723 (nearly six months elapsed between issuance and last negotiation; transferee held not a holder in due course);

Grossman v. Chechila (1926) 127 Misc. 151, 215 N.Y.S. 353 (one year);

Schmoldt v. Chicago Stone Setting Co. (1941) 309 Ill.App. 377, 33 N.E.2d 182, 184 (sixteen months);

Franklin v. St. Louis Car Co. (1928) 321 Mo. 199, 9 S.W.2d 901 (eighteen months);

Title Loan & Investment Co. v. Fuller (1919) 105 Kan. 395, 184 Pac. 727 (twenty months).

that the taxpayers did not purchase the notes on a long-term investment basis because the notes were demand notes or already overdue (Br. for Resp. p. 18).

Respondent's argument concerning the agency situation makes three points: The Instructions and Agreement (R. 55-62) expressly constituted the Trust Company as the agent of the taxpayers for certain specified duties; the Lumber Company was not a party to this agreement; the Lumber Company merely "offered to contribute" \$250 a year for the Trust Company's services and made a "friendly suggestion" concerning the computation of interest. None of these points, we submit, has merit.

The Trust Company was in fact the agent for *both* the Lumber Company and the purchasers of the notes. There is nothing unusual in such a double agency. Agency for two principals is always permitted where, as here, both principals have knowledge of the facts and their interests are not conflicting, and the agent does not have to exercise his judgment in favor of one against the other (3 C.J.S. 18).⁴

⁴A common situation where the same agent represents each or both parties to a transaction is the familiar escrow arrangement.

Greenzweight v. Title Guar. & Tr. Co. (1934) 1 Cal.2d 577, 582, 36 P.2d 186;

Shreeves v. Pearson (1924) 194 Cal. 699, 707, 230 Pac. 448.

Other examples of an agent representing both principals in a transaction are where an agent for an insurance company also represents the insured,

John Conlon Coal Co. v. Westchester Fire Ins. Co. (N.D. Pa. 1936) 16 F.Supp. 93, 95, aff'd, 92 F.2d 160, cert. den. 302 U.S. 751;

Rossi v. Firemen's Ins. Co. (1932) 310 Pa. 242, 165 Atl. 16, 18,

and where an agent represents both vendor and purchaser of land:

United States v. Grace Evangelical Church (7 Cir. 1942) 132 F.2d 460, 462;

Allen v. Dailey (1928) 92 Cal.App. 308, 313-314, 268 Pac. 404.

To argue, as respondent does, that the Lumber Company was not a formal party to the Instructions and Agreement which the taxpayers signed is to ignore the essential nature of the transaction as an entirety. The transaction as a whole went far beyond the Instructions and Agreement. The record plainly shows that the Lumber Company was fully aware of the purchase of the notes by the taxpayers ("Relative to our R.R. mortgage which you hold in trust for the new owners"—R. 64); that the Lumber Company agreed to accept the Trust Company as the one to whom payments should be made in discharge of its obligation to the note owners, and to accept and make part payment for the services of the Trust Company in paying over the proceeds to the purchasers and real owners of the notes; and that the Lumber Company arranged with the Trust Company as to the computation of interest on the diminishing balance (which, of course, affected not only the amounts credited, respectively, to interest and principal on the Lumber Company's obligation, but also determined the amounts to be paid over as principal and interest to whoever might be the proportionate owners of the notes from time to time).

Respondent misstates the arrangement regarding payment for the Trust Company's services as a mere "offer to contribute" on the part of the Lumber Company. The Lumber Company gave a polite but positive direction: "Our company should therefore pay the same in the future and the participants in ownership should pay the

In *Schultz v. Wokal* (1942) 154 Kan. 677, 121 P.2d 240, 242, a bank acted as agent for plaintiff in collecting a note issued by defendant. The same bank acted as agent for the defendant in making payments on the note from collections from another note owned by defendant and secured by part of the land securing the first note.

balance. * * * Please bill us” (R. 64-65). These words carry the intention, tenor and form of a mandatory direction as to the framework which one phase of the transaction should take. The arrangement was “voluntary” (Br. for Resp. p. 17) only in the sense that the making of any binding contract is voluntary; when completed, it becomes obligatory. The Tax Court found (R. 141) that by this letter the Lumber Company *agreed* to pay a share of the total charges. The letter cannot be passed off as a “friendly suggestion” simply because it is worded in a polite manner and requests the Trust Company’s confirmation. The parties acted upon it; again we call attention to the stipulated facts that

“Trust Company’s charges for its services in collecting and remitting interest and principal payments *and in maintaining a record of ownership were shared* by the participating owners of record and *by Lamm Lumber Company* * * *” (emphasis added) (Stipulation of Facts, par. 9; R. 27).

Respondent’s final argument that the fact that the notes were either demand notes or already past due when purchased and therefore “could have been paid immediately” “does not tend to show a long-term investment” (Br. for Resp. p. 18) needs but brief mention. On the contrary, every incident of the transaction shows that it was a long-term investment affair. The notes were long past due, and the demand notes had to be issued to cover unpaid interest because the Lumber Company had long been in serious financial difficulties and could not pay even the interest. Southern Pacific Land Company, the holder of the notes, sold them to the taxpayers at one half the amount of the obligation (R. 63-64). It is unrealistic to assume that this would have been done if there had been

any likelihood that the notes could have been paid immediately or within the six months' period of a short-term capital investment. Furthermore, the arrangement with the Trust Company, with its attendant details and expense, unquestionably signified an investment to be held and realized over a considerable period of time.

The respondent's whole approach to this problem is based upon hypothetical assumptions as to the nature of the transaction contrary to the actualities of the situation. It is stipulated that the taxpayers purchased the notes for investment. Because the obligor gradually became solvent, the taxpayers' investment appreciated in value. This is the essence of a capital gain, which it is the design of the law to tax only as to one half of its amount (or to credit only as to one half of its amount had there been a loss). So far as regards the formalities of the law, it is not concerned with how or when or by whom the securities are registered so long as they are in fact registered at the time of their retirement. Here the list of ownerships kept by the Trust Company (which had possession of the notes and needed no other protection) served every purpose of a register and was treated and acted upon as such.

Dated, San Francisco, California,

May 31, 1951.

Respectfully submitted,

HARRY R. HORROW,

FRANCIS N. MARSHALL,

CLAUDE H. HOGAN, JR.,

THOMAS E. HAVEN,

Attorneys for Petitioner.

No. 12843

United States
Court of Appeals
for the Ninth Circuit.

ILENE CHARLES, also Known as ARLENE
CHARLES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court of the United States
for the Territory of Hawaii.

FILED

MAY 17 1915

PAUL H. O'BRIEN

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

For the Plaintiff, United States of America,
UNITED STATES DISTRICT ATTORNEY,
Federal Building,
Honolulu, T. H.

For the Defendant, Ilene Charles,
E. J. BOTTS, ESQ.,
Stangenwald Building,
Honolulu, T. H.

In the United States District Court
For the District of Hawaii

Cr. No. 10,386

(26 U. S. C. 2553(a))

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ILENE CHARLES, also known as ARLENE
CHARLES,

Defendant.

INFORMATION

The United States Attorney Charges:

That on or about the 21st day of September, 1950, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Ilene Charles, also known as Arlene Charles, did knowingly, wilfully, unlawfully and feloniously purchase a salt compound and derivative of opium, to-wit, 5 capsules each containing heroin, which heroin was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), Title 26, United States Code.

Dated at Honolulu, T. H., this 29th day of December, 1950.

RAY J. O'BRIEN,
United States Attorney,
District of Hawaii.

By /s/ NAT RICHARDSON, JR.,

HOWARD K. HODDICK,
Assistant United States Attorney,
District of Hawaii.

[Endorsed]: Filed December 29, 1950.

【Title of District Court and Cause.】

MINUTES OF FRIDAY, JANUARY 5, 1951

On this day came Mr. Nat Richardson, Jr., Assistant United States District Attorney, and also came the defendant herein with Mr. E. J. Botts, her counsel. This case was called for trial.

Oral waiver of trial by jury was made by Mr. Botts.

Opening statement was made by Mr. Richardson.

At 10:10 a.m., Mr. Wm. K. Wells, Acting District Supervisor, Narcotic Bureau, District of Hawaii, was called and sworn and testified on behalf of the United States.

Copy of Report of property purchased or seized under narcotic and marihuana laws was admitted in evidence as United States Exhibit "A," marked and ordered filed.

At 10:17 a.m., Mr. Lowell Cain, Honolulu Police Department Officer, was called and sworn and testified on behalf of the United States.

It was stipulated by respective counsel as to the testimony of Honolulu Police Department Officer Andrade if he were called and sworn to testify herein.

At 10:20 a.m., the government rested, and the defendant also rested.

Argument was then had by Mr. Botts.

Upon the evidence adduced, the Court found the defendant guilty as charged in the Information and adjudged the defendant guilty.

The Court then ordered the defendant committed to prison for a period of one year and one day. Exceptions to the Court's findings were noted by Mr. Botts, and notice of appeal was given. Bond on appeal was set in the sum of \$2,500.00.

Upon request of Mr. Botts, mittimus was ordered stayed to January 8, 1951.

The Judgment and Commitment reads as follows:

“Cr. No. 10,386

“(26 U. S. C. Sec. 2553(a))

“UNITED STATES OF AMERICA,

vs.

“ILENE CHARLES, also known as ARLENE CHARLES.

“On this 5th day of January, 1951, came the attorney for the government and the defendant appeared in person and by counsel, E. J. Botts, Esquire.

“It Is Adjudged that the defendant has been

convicted upon her plea of not guilty and a finding of guilty by the court; of the offense of knowingly, wilfully, unlawfully and feloniously purchasing a salt compound and derivative of opium, to wit, 5 capsules each containing heroin, which heroin was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), Title 26, United States Code, as charged and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

“It Is Adjudged that the defendant is guilty as charged and convicted.

“It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and one (1) day.

“It Is Ordered that mittimus is stayed until 12:00 o'clock noon on January 8, 1951.

“It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

“/s/ D. E. METZGER,

“United States District Judge.

“/s/ WM. F. THOMPSON, JR.,

“Clerk.”

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Ilene Charles,
1467 Kokea Street, Honolulu, Hawaii.

Name and address of appellant's attorney: E. J.
Botts, Stangenwald Building, Honolulu, Hawaii.

Offense: Violation of Section 2553(a), Title 26,
United States Code.

Judgment and order: Defendant was tried, con-
victed, and sentenced on January 5, 1951, and sen-
tenced to one year and one day in Oahu Prison.

Bail: Defendant has filed appearance bond in
the sum of Two Thousand Five Hundred Dollars
(\$2,500.00).

I, the above-named appellant, hereby appeal to
the United States Court of Appeals for the Ninth
Circuit from the above-stated judgment.

Pursuant to Rule V, I hereby serve notice that I
do not elect to enter upon the service of the sentence
pending appeal.

Dated: Honolulu, Hawaii, January 8, 1951.

ILENE CHARLES,

By /s/ E. J. BOTTS,

Appellant's Attorney.

[Endorsed]: Filed January 8, 1951.

In the United States District Court
For the Territory of Hawaii

Criminal No. 10,386

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ILENE CHARLES, also known as ARLENE
CHARLES,

Defendant.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S.
District Court, Honolulu, T. H., on January 5, 1951.
Before: Hon. Delbert E. Metzger, Judge.

Appearances:

NAT RICHARDSON, JR., ESQ.,

Assistant U. S. Attorney,

Appearing for Plaintiff;

EBERT J. BOTTS, ESQ.,

Appearing for Defendant.

The Clerk: Criminal No. 10,386, United States
of America vs. Ilene Charles, also known as Arlene
Charles, for trial.

Mr. Botts: Ready, your Honor.

Mr. Richardson: Ready, your Honor.

The Clerk: There is a waiver of a jury trial.

Mr. Botts: I state in open court for the purpose
of the record that we waive a jury trial.

(Testimony of William K. Wells.)

The Court: All right. You may proceed.

Mr. Richardson: If your Honor please, I would like to make a short opening statement. In this case Mr. William K. Wells secured a search warrant on September 16, 1950, authorizing him to search the premises occupied by Ilene Charles at 3237 Nimitz Highway. Pursuant to that search warrant he went to the premises at that address on September 21, 1950, in company with some other officers. The defendant, Mrs. Charles, slammed the door when he attempted to serve the search warrant. However, they effected entry. When the officers went in they saw Mrs. Charles go to the bathroom and throw an object into the commode. They were immediately back of her, they followed her in, and out of the commode they secured three capsules of heroin, and also in the premises at two other places, two other capsules were found. Just briefly, your Honor, those are the facts we will undertake to prove.

WILLIAM K. WELLS

a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Richardson:

Q. Will you state your full name, please?

A. William K. Wells, acting district supervisor of the bureau of narcotics for the Territory of Hawaii.

(Testimony of William K. Wells.)

Q. Mr. Wells, do you know this defendant, Ilene Charles? A. I do, sir.

Q. In September of this year did you secure a search warrant to search the premises where this woman lived? A. Yes, sir.

Q. Can you point out Ilene Charles here in the courtroom?

A. That is the lady sitting on the right of Mr. Botts.

Q. Now, Mr. Wells, upon what information did you base that search warrant?

Mr. Botts: Just a moment. That is objected to as incompetent, irrelevant and immaterial. There is no attack [2*] made upon the search warrant, your Honor. It is what turned up as a result of the search that is before the Court.

The Court: What is the materiality?

Mr. Richardson: If there is no attack on the warrant, I want to show the cause for its issuance.

The Court: All right.

Q. (By Mr. Richardson): Mr. Wells, pursuant to that search warrant—what is the date of that search warrant?

A. It was obtained on September 20th—I mean September 18th.

Mr. Botts: We make no attack on the issuance of the search warrant.

Mr. Richardson: I want Mr. Wells to tell us what happened.

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of William K. Wells.)

Mr. Botts: We are not attacking the search warrant.

Q. (By Mr. Richardson): Well, a warrant was issued. Mr. Wells, state what you did.

A. On September 21, 1950, accompanied by Lt. Alfred A. Sousa, Officer Boyd Andrade, Lowell Cain, and Charles Gerlach, we proceeded—we left the office about 12:00 o'clock noon, and we proceeded to 3237 Nimitz Highway. As we approached the rear door of the premises I saw the defendant standing—the rear door was open—I saw the defendant standing inside the hallway.

I said, "Ilene Charles, I have a search warrant for [3] your person and premises." She slammed the door on me. I then said, "Ilene Charles, you are under arrest." We had to break the door down.

Q. Who broke the door down, Mr. Wells?

A. Officer Cain. We entered the premises. I went through the front bedroom where the common-law husband, Mr. Charles, was lying in bed. A few minutes later they brought the defendant in the front room and Officer Cain produced three capsules of heroin and had the defendant sit on an ottoman. I read the search warrant to her; she accepted it. And when I looked up I saw a capsule of heroin was stuck on the ottoman. The capsule of heroin was still wet. A search of the premises was made. Agent Lowell Cain found one capsule of heroin and two hypodermic needles.

Q. Where was that found, Mr. Wells?

A. They were found underneath the sofa in the

(Testimony of William K. Wells.)

living room. Also found in the premises was one hypodermic needle and three eye-droppers and about 80 empty gelatin capsules in the bathroom.

Q. Mr. Wells, was anyone else present there at the time you raided it?

A. Her commonlaw husband, J. D. Charles, was lying in bed in the bedroom, his mother, Mrs. Charles, and Mrs. Phyllis Bohesian, and another girl by the name of Ann Beyer.

Q. Did anyone else come in while the raid was on? [4]

A. A couple of known addicts, a fellow known as Sepa was in the front bedroom, and Herbert Wilkerson came in.

Q. Is that the same Herbert Wilkerson who was tried up here recently? A. Yes.

Q. Mr. Wells, between the time you secured the warrant and the time the raid was made, did you have the place under surveillance out there?

A. I was out there with Officer Cain. We placed the premises under observation on September 13th.

Q. Did you see anybody going in and out there?

A. I saw several known addicts going in and out of the premises.

Q. People that you knew were addicts?

A. Yes, sir.

Q. Now, the capsules that were turned over to you there that night, what did you do with them?

A. On October 3, 1950, I took the evidence to Mr. G. J. Carr, U. S. Customs chemist, for analysis.

Q. Did he make a report to you of that analysis?

(Testimony of William K. Wells.)

A. On October 5th I received the evidence in a report from Mr. Carr.

Mr. Richardson: If your Honor please, I understand Mr. Botts will stipulate that if the chemist were called here to testify, he would testify that this is his report. [5]

Mr. Botts: All right.

Mr. Richardson: Which were the particular capsules found there at that time. With your consent I would like to introduce that in evidence.

Mr. Botts: All right.

Mr. Richardson: It shows that three capsules contained 4.3 grains of heroin hydrochloride; one capsule contained 1.1 grains of heroin hydrochloride; the last capsule contained 0.18 grains of heroin hydrochloride.

The Clerk: Government's Exhibit A.

(Thereupon, the document above referred to was received in evidence as U. S. Exhibit A.)

(Testimony of William K. Wells.)

PLAINTIFF'S EXHIBIT No. A

Report of Property

Purchased or Seized Under Narcotic and Marihuana Laws

Office of District Supervisor,

Case No. B-4204
Defendant Ilene Charles - Arlene Charles - Aileen Charles

Honolulu 1, Hawaii, T. H.

1. Description of seizure.*

October 3, 1950

Market Value

Ex. No.	No. Pkgs.	Suspected Drug	Marks or Labels	Quantity (Gr.)	Illegitimate
2	2	Capsules of Heroin	No distinctive markings4.3	\$50.00
3	1	Capsule of Heroin	No distinctive markings1.1	\$10.00
4	1	Capsule of Heroin	Wrapped in white cellophane paper0.18	\$10.00

2. Date and place of seizure September 21, 1950—3237 Nimitz Highway, Honolulu, T. H.

3. Drugs not sent to chemist are located at Strong Room, 575 Alexander Young Building, Honolulu, T. H.

4. Remarks: Exhibits 2, 3, and 4 submitted to Mr. G. J. Carr, U. S. Customs - Chemist-in-Charge, Room 243, Federal Building, Honolulu, T. H., for analysis on October 3, 1950.

5. Rendered by /s/ WILLIAM K. WELLS,
Narcotic Agent./s/ WILLIAM K. WELLS,
Acting District Supervisor.

(Testimony of William K. Wells.)

Chemist's Report of Analysis

Total Wt. Found		Weight After Analysis	
Ex. No.	Lab. No.	Gr.	Gr.
2	444	4.3*	4.2*
3	445	1.1	1.0*
4	446	0.18	0.14

Remarks: * Gross Weight. The capsules were smashed.

Unused portions returned to Mr. Wm. K. Wells, 10-5-50.

G. J. Carr, Chemist in Charge.

Record of Seals

Date Sealed	Initialed by (not less than 2 persons)	Date Seals Broken	Broken by	Remarks
10-2-50	WKW & LWC	10-4-50	GJC	Analysis
GJC 10-4-50	GJC			

6. Other property:

Number Name and Description of Articles

- 5 One hypodermic needle and three eye droppers.
- 6 Two boxes containing approximately eighty Gelatin Capsules.
- 7 Two hypodermic needles, one eye dropper, one burned teaspoon with no handle, and a small wad of cotton wrapped in a piece of Honolulu Star Bulletin paper dated Tuesday, September 12, 1950.

Received U. S. Customs Laboratory, Honolulu, T. H., 10:40 a.m., October 3, 1950.

Admitted January 5, 1951. /s/ G. J. CARR.

(Testimony of William K. Wells.)

Q. (By Mr. Richardson): The place where this raid was made and upon which you had this search warrant was here on this island in the City and County of Honolulu; is that right? A. Yes.

Q. Did she make any statement?

A. We took the defendant down to the vice squad office, warned her of her rights, and she refused to answer any questions.

Mr. Richardson: That is all. [6]

Cross-Examination

By Mr. Botts:

Q. Now, Mr. Wells, that house you spoke of where you entered and searched, did you find out who the tenant was, that is, the legal tenant who rented that house? A. No, sir, I didn't.

Q. You say that J. E. Charles was there?

A. Yes, sir.

Q. He was in the house at the time?

A. He was sick, and he was lying in bed in the front bedroom.

Q. So far as you know, he and Mrs. Charles live there together; is that correct?

A. Well, that is what she told me; she had been living with him since they came here in 1946 and prior to that in San Francisco.

Q. Was he arrested?

A. No, sir. Prior to leaving the house I asked Mr. Charles, "Does these five capsules of heroin belong to you?" He said, "No, I don't know anything about it."

(Testimony of William K. Wells.)

Q. Mrs. Charles had never been arrested by you on a charge of narcotic violation?

A. According to the Honolulu Police Department she has no previous criminal record in Honolulu.

Mr. Botts: That is all. If the other officers were called, [7] I will stipulate that they would testify the same.

Mr. Richardson: I want to put on one more officer.

Mr. Botts: Go ahead and put them all on. I am not trying to short circuit you.

LOWELL CAIN

a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Richardson:

Q. Will you state your full name, please, Mr. Cain? A. Lowell Cain.

Q. What is your occupation?

A. Motor patrolman attached to the Honolulu police, assigned to Agent Wells.

Q. Were you with Mr. Wells on the day of September 21, 1950, when a raid was made on the premises of Ilene Charles? A. I was, sir.

Q. What time did you all get out there, Mr. Cain?

A. I had been there previous, about an hour

(Testimony of Lowell Cain.)

before Mr. Well and the other members of the squad arrived. I had been on surveillance, the home known as 3237 Nimitz Highway, from across on Kam Highway.

Q. Now, when Mr. Wells got there, just tell the Court what happened. [8]

A. Well, after Mr. Wells met me on Kam Highway, we proceeded in two cars to the rear of the defendant's home and walked up to the rear of the house, and Mr. Wells and myself approached the rear door, which was open, with only the screen door being closed. At this time the defendant was seen standing in the doorway, and Mr. Wells announced himself as a Federal officer and that he had a search warrant for her person and the premises. Immediately the door was slammed by the defendant, and I broke the door in.

Q. Was anyone with you?

A. Mr. Wells entered right after me, and Andrade.

Q. Mr. Andrade; that is another officer?

A. Yes, sir.

Q. Go ahead.

A. And as we entered into the house the defendant was seen to run into what was the bathroom, and Andrade and I broke the door in and entered into the bathroom. And as we entered the bathroom she had her hand in the bowl——

Q. You mean the commode?

A. ——of the commode, and was attempting to

(Testimony of Lowell Cain.)

flush it, and it was flushing then. Officer Andrade grabbed her with the assistance of Mr. Sousa, who had entered about the same time, and as they grabbed her, I started throwing the water out of the bowl and recovered three capsules which had not been flushed down the toilet. [9]

Q. Were they still floating on the water there?

A. Well, they were moving around in the water. There was a number of other capsules, also, in the water, but I couldn't get them quick enough.

Q. But you did take three out of it?

A. Yes.

Q. Those are the capsules you later turned over to Mr. Wells? A. Yes.

Q. Mr. Cain, you say she was running toward the bathroom?

A. Well, she ran into the bathroom. She had only three or four feet to go.

Q. You were all right behind?

A. We were, sir.

Q. Now, were you present when another capsule was found on an ottoman?

A. I was, sir, in the front room when it was found.

Q. What did you do with Mrs. Charles after the three in the bathroom were recovered?

A. Well, Officer Andrade and Lt. Sousa led her into the front room where Mr. Wells talked to her, and I stayed in the bathroom and commenced the search of the bathroom.

(Testimony of Lowell Cain.)

Q. You didn't find anything?

A. Found one hypodermic needle and three little glass [10] eye-droppers.

Q. Now, Mr. Andrade was with you all the time that you were there; is that correct?

A. Yes, sir.

Q. Is there anything else you know about it, Mr. Cain?

A. Well, nothing that I seen with my own eyes that I can testify to.

Mr. Richardson: I think that is all.

Mr. Botts: No questions.

Mr. Richardson: If your Honor please, Mr. Andrade's testimony would be entirely cumulative. Will you stipulate, Mr. Botts, that he would testify just the way Mr. Cain——

Mr. Botts: Just a moment, Mr. Cain. May I ask one question?

Cross-Examination

By Mr. Botts:

Q. In that house how many people were living at the time; how many people at the house?

A. From the surveillance I had had on it from the previous day and other times, there was only three women that I had seen actually living there.

Q. Well, Mr. Charles lived there, didn't he?

A. Mr. Charles lived there.

Q. Did you check to see who the legal tenants were? [11]

A. No.

(Testimony of Lowell Cain.)

Q. You didn't. But at the time you entered the place there were several people there?

A. There were several people there, but they were not known to live there.

Q. They were visiting there? A. Yes, sir.

Q. As far as you know three people——

A. Three women and Mr. Charles, yes.

Mr. Botts: That is all.

Mr. Richardson: Just one question.

Redirect Examination

By Mr. Richardson:

Q. Was Mr. Charles in bed all the time that you were there, as far as you know?

A. Yes, sir.

Mr. Richardson: That is all. That is the Government's case.

Mr. Botts: The defendant rests, your Honor. I would like to make a short statement. Can I proceed, your Honor?

The Court: Yes.

Mr. Botts: Your Honor, this woman has come into court—that is, she has facilitated these proceedings; we haven't asked to go before the Grand Jury, and I figure possibly on the showing made there is no question she had possession of the narcotics. It is a different thing entirely whether she was the owner of it. But she is charged here with possession, and we are not disputing that she had possession.

She has no criminal record. She is obviously not an addict. She has lived in the Territory for five years, and as far as the record shows has committed no offense at all. She came in here frankly, and hasn't tried to pull anything over the Court's eyes or counsel's eyes or anybody. She is legally guilty of having possession of those narcotics, but the ownership is something else again. And we submit, your Honor, she is entitled to the consideration of this Court to be given an opportunity on probation. She will certainly have nothing to do with narcotics in any manner, shape or form again. I submit that her whole conduct commends itself to your Honor's leniency, and especially the fact that she is a woman.

The Court: Any argument?

Mr. Richardson: No, sir.

The Court: Upon the uncontroverted evidence on behalf [12] of the Government, the defendant is adjudged guilty.

Is the defendant ready for sentence?

Mr. Botts: Ready, your Honor.

The Court: It is the judgment and sentence of the Court she be confined to prison for a year and a day.

Mr. Botts: Can mittimus be stayed, your Honor, for a couple of days, say until Saturday noon?

The Court: For what purpose?

Mr. Botts: For the purpose of the record may I note an exception? May a mittimus be stayed until Monday? She is under a substantial bond.

The Court: Well, the bond wouldn't be effective after sentence is pronounced.

Mr. Botts: Well, how can we handle it?

The Court: What is the purpose of the stay of mittimus? What are her obligations that would require it?

Mr. Botts: Well, she wants to talk to her friends, your Honor, and we are a little bit taken by surprise, and I would like to have an opportunity to consult with her. That is, we have come in here and put no obstacles at all in the way of getting this before the Court.

The Court: Well, I recognize that as being true, but then this woman was caught redhanded with narcotics in her possession and made an attempt to destroy the evidence, did everything that was within her capacity, according to the [13] evidence, to destroy it, and she has been shown to be guilty—and it was in a place where known addicts were assembled. This narcotics business seems to have gotten quite a bulge here in this community, and it is a very dangerous and damaging thing to a certain element of the community. I don't feel disposed to give this woman two or three days to talk matters over with her friends. They can call on her while she is in custody.

Mr. Botts: Well, would you fix some bond on an appeal?

The Court: What is the bond?

Mr. Richardson: The present bond is \$2500, your Honor.

The Court: Who is the bondsman?

Mr. Botts: Fong Hing, I believe.

The Court: Well, if you can get him to come into court here and consent——

Mr. Botts: I could have her in the Marshal's office and communicate with him quickly, if your Honor will fix a bond on appeal just for the purpose of facilitating this thing.

The Court: Will you give notice of intention to appeal?

Mr. Botts: I think I should for the record. May we give notice of intention to appeal and I will have Fong Hing come in, your Honor. I don't know what his action will be.

The Court: All right. Bond will be fixed in the same amount.

Mr. Botts: Thank you, your Honor. [14]

Reporter's Certificate

I, Elbert Cripps, Official Reporter, United States District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of my shorthand notes taken in Criminal No. 10,386, United States of America vs. Ilene Charles, also known as Arlene Charles, January 5, 1951, before Hon. Delbert E. Metzger, Judge.

January 11, 1951.

/s/ ELBERT CRIPPS.

[Endorsed]: Filed January 19, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following listed original pleadings, exhibit, and transcript of proceedings:

Information

Judgment and Commitment

Notice of Appeal

Cost Bond

Designation of Record on Appeal

United States Exhibit "A"

Transcript of Proceedings—January 5, 1951.

I further certify that included in said record on appeal is a copy of the court minutes of January 5, 1951.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of January, 1951.

[Seal] /s/ WM. F. THOMPSON, JR.,

Clerk, United States District
Court, District of Hawaii.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
SUPPLEMENTAL RECORD

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing supplement to record on appeal in the above-entitled cause, consists of the following:

Official Reporter's Transcript of Argument of Attorneys had on January 5, 1951.

Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 23rd day of January, 1951.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court, District of Hawaii.

[Endorsed]: No. 12843. United States Court of Appeals for the Ninth Circuit. Ilene Charles, also known as Arlene Charles, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed January 29, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ILENE CHARLES, also known as ARLENE
CHARLES,

Defendant-Appellant.

STATEMENT OF POINTS TO BE RELIED
UPON BY DEFENDANT-APPELLANT ON
APPEAL

Comes now Ilene Charles, also known as Arlene Charles, Defendant-Appellant, by E. J. Botts, her attorney, and hereby states that Defendant-Appellant, in taking this appeal, will rely upon the following points:

1. That the evidence adduced in the trial of the above-entitled matter was insufficient to establish the guilt of Appellant and Appellant should have been discharged by the trial court.

2. That the search of the premises occupied by Appellant and others on September 21, 1950, resulted in the finding and seizure of certain alleged narcotics. That on the trial of the above-entitled matter, the alleged drugs seized were not offered in evidence, no proof was adduced that Appellant owned or possessed said drugs, and in lieu of evidence her conviction was obtained by multiple presumptions, pyramided on each other as follows:

(a) the presumption that the narcotics found in the dwelling belonged to Appellant, (b) the presumption that they were not in or from the original stamped package, (c) the presumption that she purchased them, and (d) the presumption that they were purchased in the District of Hawaii. Competent evidence of Appellant's guilt of the charge contained in the Information being absent, the court erred in finding her guilty.

3. No facts or circumstances were developed in the trial of said cause which tended to show that the alleged narcotic drugs referred to in the Information were purchased by Appellant in the District of Hawaii, and in the absence of such facts and circumstances there was no proof of venue, and the trial court was without jurisdiction to proceed to judgment and sentence in this matter.

4. The prosecution did not put in evidence for identification and as part of its proof the alleged narcotics mentioned and described in the Information, and by reason of its failure to do so the evidence against Appellant was insufficient to support the decision and judgment herein, and Appellant should have been discharged.

5. Because of the failure of the prosecution to offer in evidence for identification and as part of its proof the narcotics mentioned and described in the Information, Appellant was entitled to the benefit of the favorable presumption that, if offered, said narcotics would have negatived rather than supported the charge in the Information, and an

order and judgment should have been entered by the trial court discharging her.

6. The prosecution failed to show that the narcotics mentioned and described in Exhibit "A" were the same narcotics alleged to have been found September 21, 1950, in the dwelling house where Appellant was arrested on said day by William K. Wells, witness for the prosecution.

By reason of said errors and other manifest errors appearing in the record designated herein, the order, judgment and sentence should be set aside.

Dated: Honolulu, T. H., this 19th day of January, 1951.

ILENE CHARLES,
also known as
ARLENE CHARLES,

By /s/ E. J. BOTTS,
Her Attorney.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 29, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE
PRINTED ON APPEAL

Comes now the United States of America, Plaintiff-Appellee in the above-entitled cause, by Howard K. Hoddick, Acting United States Attorney for the District of Hawaii, and hereby designates for inclusion in the printed record on appeal, the following:

1. Official Reporter's Transcript of Argument of Attorneys had on January 5, 1951.
2. Designation of Record on Appeal.
3. This Designation of Record to be Printed on Appeal.

Dated: Honolulu, T. H., this 23rd day of January, 1951.

HOWARD K. HODDICK,
Acting United States Atty.,
District of Hawaii.

By /s/ NAT RICHARDSON, JR.,
Assistant United States Atty.,
District of Hawaii.

[Endorsed]: Filed January 29, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE
PRINTED ON APPEAL

Comes now Ilene Charles, also known as Arlene Charles, defendant-appellant, by E. J. Botts, her attorney, and hereby designates for inclusion in the printed record on appeal, the following:

1. Information.
2. Official Reporter's Transcript of Proceedings had on January 5, 1951.
3. Plaintiff's Exhibit "A."
4. Clerk's minutes.
5. Notice of Appeal dated January 8, 1951.
6. Designation of Record on Appeal.
7. Statement of Points to be Relied Upon by Defendant-Appellant on Appeal.
8. This Designation of Record to be Printed on Appeal.

Dated: Honolulu, T. H., this 19th day of January, 1951.

ILENE CHARLES,
also known as
ARLENE CHARLES,

By /s/ E. J. BOTTS,
Her Attorney.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 29, 1951.

No. 12,843

United States Court of Appeals
For the Ninth Circuit

ILENE CHARLES, also known as
Arlene Charles,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the Territory of Hawaii.

BRIEF FOR APPELLANT.

E. J. BOTTS,

Stangenwald Building, Honolulu, Hawaii,

Attorney for Appellant.

FILED

APR 27 1951

PAUL F. O'BRIEN

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No. 12,843

**United States Court of Appeals
For the Ninth Circuit**

ILENE CHARLES, also known as
Arlene Charles,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the Territory of Hawaii.

BRIEF FOR APPELLANT.

JURISDICTION.

Title 18, *U. S. Code*, Sec. 3281 confers jurisdiction on the District Court and Title 28, Sec. 1291 grants appellate jurisdiction to this Honorable Court.

STATEMENT OF FACTS.

Appellant was convicted in the District Court for the Territory of Hawaii of violation of the Harrison Anti-Narcotic Law (26 *U. S. Code*, Sec. 2553(a)) and has appealed.

The case was tried in the District Court jury-waived, and the witnesses for the prosecution were two officers, a Honolulu police officer and a federal narcotic officer. They testified they went to a dwelling house at 3237 Nimitz Highway in Honolulu on September 21, 1950. As they approached they saw appellant standing inside the hallway (R. pp. 11, 18). She slammed the door on the officers, but this did not stop them from entering the house (R. pp. 11, 18). They found her in the bathroom, her hand in the commode (R. p. 18). Officer Cain recovered three capsules of heroin from the water in the commode (R. p. 19). Two other capsules of the same drug were found in the house (R. p. 11).

Several other persons lived in, or had access to, the house (R. pp. 12, 20, 21). But appellant was arrested and charged with the purchase of the drug. She made no statement incriminating herself, refused to answer any questions (R. p. 16).

SPECIFICATION OF ERRORS TO BE URGED.

1. The evidence adduced in the trial of the above-entitled matter was insufficient to establish the guilt of appellant and appellant should have been discharged by the trial court.

2. The search of the premises occupied by appellant and others on September 21, 1950, resulted in the finding and seizure of certain alleged narcotics. That on the trial of the above-entitled matter, the

alleged drugs seized were not offered in evidence, no proof was adduced that appellant owned or possessed said drugs, and in lieu of evidence her conviction was obtained by multiple presumptions, pyramided on each other as follows: (a) the presumption that the narcotics found in the dwelling belonged to appellant, (b) the presumption that they were not in or from the original stamped package, (c) the presumption that she purchased them, and (d) the presumption that they were purchased in the District of Hawaii. Competent evidence of appellant's guilt of the charge contained in the information being absent, the court erred in finding her guilty.

3. No facts or circumstances were developed in the trial of said cause which tended to show that the alleged narcotic drugs referred to in the information were purchased by appellant in the District of Hawaii, and in the absence of such facts and circumstances there was no proof of venue, and the trial court was without jurisdiction to proceed to judgment and sentence in this matter.

4. The prosecution did not put in evidence for identification and as part of its proof the alleged narcotics mentioned and described in the information, and by reason of its failure to do so the evidence against appellant was insufficient to support the decision and judgment herein, and appellant should have been discharged.

5. Because of the failure of the prosecution to offer in evidence for identification and as part of its

proof the narcotics mentioned and described in the information, appellant was entitled to the benefit of the favorable presumption that, if offered, said narcotics would have negatived rather than supported the charge in the information, and an order and judgment should have been entered by the trial court discharging her.

6. The prosecution failed to show that the narcotics mentioned and described in Exhibit "A" were the same narcotics alleged to have been found September 21, 1950, in the dwelling house where appellant was arrested on said day by William K. Wells, witness for the prosecution.

ARGUMENT.

1. NO EVIDENCE OF VIOLATION.

The court erred in finding appellant guilty for the reason that no evidence was offered to support the averment that the drugs were not in or from an original stamped package and the drugs themselves were not produced and put in evidence to speak for themselves on this point; and in the absence of such evidence, either parol or physical, appellant was entitled to the benefit of the presumption of innocence and should have been discharged.

Nothing occurred in the trial which overcame this presumption. The police officer (R. p. 19) and narcotic officer (R. p. 11) testified that they found a few capsules of heroin in a house where appellant was

at the moment, but no claim was made that it was not in or from a stamped package; and the prosecution chose not to produce and offer the alleged narcotics as evidence in the case.

The Harrison Anti-Narcotic Act (26 *U. S. Code*, Sec. 2553(a)), under which appellant was charged, is a revenue measure. It does not make the mere possession of narcotics a crime. There must be absence of appropriate revenue stamps for possession to ripen into a criminal offense.

U. S. v. Jin Fuey Moy, 241 U.S. 394, 36 Sup. Ct. 658;

Linder v. U. S., 268 U.S. 5, 45 Sup. Ct. 446

Under the Act, the burden of proof is on the prosecution to prove the drug involved was not in or from an original stamped package. In *Weaver v. U. S.*, 15 Fed. (2d) 38, defendant was charged with violating this Act. The court said:

“Count 3 charged him with the sale of morphine which was not then and there sold in the original stamped package, nor from such original stamped package. On the trial of the cause evidence was introduced tending to prove that defendant was in possession of the morphine, that he sold morphine to C. H. Spearman, *but no evidence was offered tending to prove that the package of morphine in defendant’s possession, or the package in or from which he sold the drug to Spearman, was unstamped. A package was handed to the witness, Spearman, who identified it as the package containing morphine purchased from the defendant, but the package itself was not in-*

troduced in evidence, nor does it appear from the record that it was exhibited to the jury."

2. INFERENCE FROM WITHHOLDING EVIDENCE.

Special significance should be attached to the fact that the prosecution chose not to produce and put in evidence the articles seized, including the alleged capsules of heroin. The inference is that their production would not have been favorable to the prosecution.

Where a party has it peculiarly within his power to produce evidence to clarify a point and he elects not to do so, the inference is that the evidence if produced, would have been unfavorable to that party.

Milton v. United States, 110 Fed. (2d) 556;

United States v. Walker, 152 Fed. (2d) 612;

Morei v. United States, 127 Fed. (2d) 827;

Clayton v. United States, 152 Fed. (2d) 402;

United States v. Doores, 58 Fed. Supp. 491.

Here, we submit, where appellant was expressly charged with purchase of certain heroin not in or from the original stamped package, and the prosecution having offered no parol evidence in support of the gravamen of the offense, viz.: that it was not in or from an original stamped package, the failure of the prosecution to produce and put in evidence the drug in question, leaves the charge against appellant unproved, the presumption of her innocence prevails, and she should have been discharged.

3. NO EVIDENCE OF VENUE.

Stripped of unnecessary verbiage, appellant was charged with purchasing on September 21, 1950, certain narcotics not in or from the original stamped package. The Harrison Anti-Narcotic Act sanctions a presumption of purchase where a person is found in possession of unstamped narcotics (Title 26, *U. S. Code*, Sec. 2553(a)). It is of course incumbent on the prosecution, seeking the benefit of this presumption, to prove the narcotics in question were in fact unstamped. In the case at bar, this was neither done nor attempted, and we submit, because of this circumstance, the presumption has no place in this case.

But even giving the prosecution the benefit of this presumption, no venue was shown. The presumption of purchase does not carry with it the presumption that the purchase occurred at the place of arrest or in the District or Territory of Hawaii. Appellant was arrested at 3237 Nimitz Highway, in Honolulu, but there is nothing in the evidence to show she lived there, or that she lived in the District and Territory of Hawaii. She was in the house when the officers came, and that is all there is on the subject. Under the circumstances, we submit, there is nothing in the record to show venue.

Cain v. United States, 12 Fed. (2d) 580;

Flowers v. United States, 83 Fed. (2d) 78;

Donaldson v. United States, 23 Fed. (2d) 178;

Brightman v. United States, 7 Fed. (2d) 532;

Acuna v. United States, 74 Fed. (2d) 359.

The facts here distinguish this case from *Casey v. United States*, 20 Fed. (2d) 752. The Supreme Court, in sustaining the decision of this court in that case (276 U. S. 413, 48 Sup. Ct. 373), pointed out that there were special facts in that case to submit the issue to the jury. Said the court:

“But we are of opinion that upon the facts of this case the court was right. If the jury believed that the defendant, long established in Seattle, said that he had not the drug, but would, and shortly thereafter did, furnish it, the inference that he bought it in Seattle was strong
* * *”

In this case, appellant made no statement whatever, there is nothing to indicate whether she lived in Honolulu or had just arrived by plane. We submit that venue was not proved.

4. NO EVIDENCE OF APPELLANT'S POSSESSION OF DRUG.

The presumption created by the Harrison Anti-Narcotic Act that the possession of narcotics not in or from the original stamped package is *prima facie* evidence of purchase, contemplates that such possession should be personal and exclusive (see *Willsman v. United States*, 286 Fed. p. 852, and cases cited). The record does not show that appellant ever had such possession of the drug referred to in the information. The prosecution asked the court to infer possession from the fact that appellant was found

with her hand in the commode where the heroin capsules were floating (R. p. 19). There was no evidence she put the capsules there; no evidence that she wasn't as much opposed to their presence in the house as the officers. It has frequently been said that for possession of narcotics to be a crime, the possession must be conscious and willing (*Ezzard v. United States*, 7 Fed. (2d) 808). Several other persons lived in the house where the arrest was made and the drugs found, and the only apparent reason the officers chose to arrest appellant and not one or more of the other occupants was because she was nearer, measured by inches, to the floating drug than the others when the officers entered the bathroom. We do not believe criminal cases should be tried on surmises in place of evidence, as was done here, but we wish to point out that reasonable surmises based on appellant's conduct are more consistent with her innocence than guilt.

5. INFERENCE ON INFERENCE.

It is respectfully submitted that the Harrison Anti-Narcotic Act does not authorize or contemplate such a chain of inferences or presumptions as were invoked in this case. *The Act provides for only a single inference or presumption.* Where drugs are found without the "appropriate tax paid stamps," the statute sanctions the presumption that they were purchased in violation of law. This is a presumption of fact (*Di Salvo v. United States*, 2 Fed. (2d) 222) and the

evidence must show either that they were not in an original stamped package or from one (*Flowers v. United States*, 83 Fed. (2d) 78). In this case, though presumably the prosecution had evidence at hand to clarify the point, it chose not to do so, which warrants the conclusion that, if produced, the evidence would have been unfavorable to the prosecution.

The prosecution has asked the court (1) to presume that the drugs were not in or from an original stamped package, and (2) to presume that they belonged to appellant, and (3) to presume that she purchased them in violation of law, and (4) to presume she purchased them in Hawaii. Such a chain of inferences and presumptions are wholly alien to the fundamental principles embraced in our concept of due process, and makes the strongest presumption of all—the presumption of innocence—meaningless.

CONCLUSION.

It is respectfully submitted, for the reasons set forth above, the decision and judgment of the court below should be set aside and appellant discharged.

Dated, Honolulu, Hawaii,

April 18, 1951.

Respectfully submitted,

E. J. BOTTS,

Attorney for Appellant.

No. 12,843

IN THE
United States Court of Appeals
For the Ninth Circuit

ILENE CHARLES, also known as Arlene
Charles,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLEE.

HOWARD K. HODDICK,
Acting United States Attorney,
District of Hawaii,

NAT RICHARDSON, JR.,
Assistant United States Attorney,
District of Hawaii,

CHAUNCEY TRAMUTOLO,
United States Attorney,
San Francisco, California,

Attorneys for Appellee.

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No. 12,843

IN THE
United States Court of Appeals
For the Ninth Circuit

ILENE CHARLES, also known as Arlene
Charles,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLEE.

JURISDICTION.

Title 18, United States Code, Section 3281 confers jurisdiction on the District Court, and Title 28, United States Code, Section 1291 confers appellate jurisdiction on this Honorable Court.

STATEMENT OF FACTS.

This case was tried on January 5, 1951 before the District Court of Hawaii sitting without a jury. The

Defendant was convicted of violation of Title 26, United States Code, Section 2553(a). On September 21, 1950, pursuant to a search warrant, Mr. William K. Wells, the Acting District Supervisor of the Bureau of Narcotics for the Territory of Hawaii, together with Lowell Cain and some other officers, went to the premises at 3237 Nimitz Highway, the place described in the search warrant. No attack was made on the search warrant. (R. 10.) The rear door of the premises was open and the Defendant, Ilene Charles, also known as Arlene Charles, was standing in the hallway. The Defendant slammed the door, after being notified that the officers had a warrant for her person and premises, and Officer Cain broke the door down. (R.11.) Cain testified that the defendant ran towards the bathroom, he followed, and she had her hand in the bowl of the commode and was attempting to flush it. (R. 18, 19.) Cain started throwing water out of the bowl and recovered three capsules which had not been flushed down the toilet. (R. 19.) Mr. Wells recovered a wet capsule which was stuck on the ottoman (R. 11), and Cain recovered one hypodermic needle and three glass eye-droppers. (R. 20.) The defendant made no statement incriminating herself and did not take the stand.

ARGUMENT.

The specifications of error will be taken up separately.

I. THERE WAS EVIDENCE OF VIOLATION.

Defendant contends that there was no evidence to support the averment that the drugs were not in or from an original stamped package, and offers in support thereof *Weaver v. United States*, 15 F. (2d) 38. The *Weaver* case was decided on October 16, 1926 which was before the *Casey* case (276 U.S. 413, 48 Supreme Court 373) decided April 9, 1928. In a comment on the *Casey* case contained in the decision in *Flowers v. United States*, 83 F. (2d) 78, 81, (cited in Appellant's brief), the Court said:

“For said Mr. Justice Holmes, speaking for the Supreme Court in that case (the *Casey* case) where the morphine had been dissolved and soaked into a towel, ‘it safely may be inferred that he (Defendant) did not proclaim his illegal purpose by putting stamps on the towels.’ ”

It is obvious that no stamps would be attached to capsules floating in the bowl of a commode.

Moreover, this Court has very recently decided, in *Cavness v. United States*, 187 F. (2d) 719, decided March 5, 1951, the exact question presented in the instant case. We quote briefly from the *Cavness* case:

“Appellant next asserts that his motion for acquittal was erroneously denied since the government failed to prove that the capsules of cocaine were not in the original stamped package,

did not have requisite tax stamps on them, and did not come from the original stamped package. Fed.R.Crim.P. 29 (a, b), 18 U.S.C.A.; and see *Globe Liquor Co. v. San Roman*, 1948, 332 U.S. 571, 574, 68 S.Ct. 246, 92 L.Ed. 177."

"The statute under which Appellant was indicted and convicted provides that 'the absence of appropriate tax-paid stamps from * * * (cocaine) shall be prima facie evidence of a violation of this subsection by the person in whose possession' such drug is found. 53 Stat. 271 (1939), as amended, 26 U.S.C.A. §2553(a). The burden of proof is thus placed upon an accused to show lawful possession. *Casey v. United States*, 1928, 276 U.S. 413, 418, 48 S.Ct. 373, 72 L.Ed. 632. The record does not reveal that appellant made any effort to meet that burden."

II. NO EVIDENCE WAS WITHHELD.

Defendant complains that the actual capsules seized from the Defendant were not placed in evidence. The Defendant stipulated that the chemist's report covering these particular capsules could be admitted in evidence by consent. This was done and the chemist's report covering these particular capsules was made the United States Exhibit "A" (R. 13). No inference of withholding evidence could possibly be drawn from the facts in this case when the Defendant by consent admitted the chemist's report and agreed that the report covered the particular capsules seized from the Defendant. The cases cited by the Defendant in his brief are cases in which evidence was actually with-

held. Here it is apparent from Defendant's stipulation (R. 13) that there was no withholding of evidence in any way.

III. THERE WAS EVIDENCE OF VENUE.

Defendant again insists that it was incumbent upon the prosecution to prove the narcotics in question were in fact unstamped. This has been answered by the *Cavness* case, *supra*, and the *Casey* case, *supra*.

The Defendant then insists that the presumption of purchase arising under the statute does not carry with it the presumption that the purchase occurred in the Territory of Hawaii. Defendant cites five cases in support of this. Of these five the *Cain* case, 12 F. (2d) 280 was decided March 22, 1926; the *Donaldson* case, 23 F. (2d) 178 was decided December 2, 1927; and the *Brightman* case, 7 F. (2d) 532 was decided August 24, 1925. These three cases were all decided prior to the *Casey* case which was decided on April 9, 1928. Further, the case of *Acuna v. U. S.*, 74 F. (2d) 359 specifically holds that venue can be established by showing possession, and cites the *Casey* case. The *Flowers* case, *supra*, also follows the *Casey* case.

IV. THERE WAS EVIDENCE OF DEFENDANT'S POSSESSION OF THE DRUG.

Nowhere at the trial did defendant make any claim that she was not in possession of the heroin capsules named in the indictment. On the contrary, it was spe-

cifically and expressly admitted that the Defendant did have possession of these capsules. (R. 21, 22.) We quote briefly from Mr. Botts' statement to the Court:

"* * * and I figure possibly on the showing made there is no question she had possession of the narcotics." (R. 21.)

"* * * she is legally guilty of having possession of these narcotics." (R. 22.)

In view of the foregoing there is nothing to be inferred with reference to possession of the narcotics as she has freely admitted having possession.

V. THERE ARE NO INFERENCES BASED ON INFERENCES IN THIS RECORD.

In answer to the points raised in Defendant's last paragraph we submit:

(1) Under the *Cavness* case which followed the *Casey* case, when possession by the Defendant of unstamped narcotics has been proved, the burden is on the Defendant to show such possession was lawful. Therefore, the Court was not asked to make any presumption other than the one set out in the statute;

(2) The Court was not asked to presume that the narcotics belonged to Defendant as she freely admitted that they were in her possession;

(3) Her possession of the narcotics, unexplained, as a matter of law is *prima facie* evidence of the violation of the statute; and

(4) Under the *Casey* case the venue is in the Territory of Hawaii where she was found in possession of the narcotics.

CONCLUSION.

The evidence adduced at the trial of this case was clearly sufficient to satisfy the trial judge of the guilt of the defendant. As the judge stated (R. 23), "This woman was caught red-handed with narcotics in her possession and made an attempt to destroy the evidence, and she has been shown to be guilty."

It is respectfully submitted from all of the foregoing that the judgment of the trial court should be affirmed.

Dated, Honolulu, T. H.,
June 11, 1951.

HOWARD K. HODDICK,
Acting United States Attorney,
District of Hawaii,

NAT RICHARDSON, JR.,
Assistant United States Attorney,
District of Hawaii,

CHAUNCEY TRAMUTOLO,
United States Attorney,
San Francisco, California,
Attorneys for Appellee.

No. 12,843

United States Court of Appeals
For the Ninth Circuit

ILENE CHARLES, also known as Arlene
Charles,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the Territory of Hawaii.

CLOSING BRIEF FOR APPELLANT.

E. J. BOTTS,

Stangenwald Building, Honolulu, Hawaii,

Attorney for Appellant.

FILED

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United States Court of Appeals For the Ninth Circuit

ILENE CHARLES, also known as Arlene
Charles,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the Territory of Hawaii.

CLOSING BRIEF FOR APPELLANT.

Since the above-entitled case came up on appeal, this court has rendered its decision in *Cavness v. United States*, 187 F. (2d) 719 (No. 12,514). Appellee contends this decision disposes of the questions presented here. We do not agree.

We have no fault to find with the opinion in the *Cavness* case. It is distinguishable from the case at bar in important particulars. Officers in arresting Cavness found several capsules of narcotics on or near him. They were taken in possession by Narcotic Agent William K. Wells and on the trial were identified and put in evidence (see Record No. 12514, pp. 60-65 and pp. 347 and 348). The judge and the jury

had the capsules before them, with the testimony of Mr. Wells that they were in the same condition as they were when found. An examination of them made it apparent that *no revenue stamps were affixed to them*. This court held that upon this showing a *prima facie* case had been made out.

On *Beland v. United States*, 100 Fed. (2d) 289, the court said:

“Under the Harrison Anti-Narcotic Act (26 U.S.C. 1043(a)) *evidence* that no revenue stamps were affixed to the drugs at time of their delivery is *prima facie* evidence that they were not sold in or from an original stamped package.”

In the *Cavness* case that evidence was produced. *In the case at bar it was not*.

It has been frequently said that in the prosecution of an unlicensed dealer in narcotics it is not necessary for the Government to prove that the drugs did not come from an original stamped package—proof almost impossible for the Government to make in most cases. *Flowers v. United States*, 83 Fed. (2d) 78. It is sufficient if proof is made by competent evidence that no revenue stamps were attached to the drugs at time of seizure. Such proof was made in the *Cavness* case. It wasn't even attempted in this case.

Appellee had it in its power, let us assume, to produce the drugs referred to in the information in support of the charge. Failure to do so leaves this case exactly in the same position as *Weaver v. U. S.*, 15 Fed. (2d) 38. In the *Weaver* case the prosecution had the narcotics in its possession in court and even

showed it to a witness, *but did not offer it in evidence* to give the court and jury an opportunity to examine it. Said the court:

“* * * but the package itself (narcotic package) *was not introduced in evidence* nor does it appear from the record that it was exhibited to the jury.” Case reversed.

On the case at bar, as far as the record shows, the drug was not even in court. By no stretch of the imagination could it be said that appellant waived its production. The report of the Government chemist who analyzed the contents of the capsules was put in evidence, without the necessity of calling the chemist. This was done as an accommodation, and that was the extent of any waiver by appellant (R. p. 13).

This is a criminal case and as a condition to conviction the evidence must establish defendant's guilt beyond all reasonable doubt. Defendant is entitled to the presumption of innocence through every step and with respect to every aspect of the case. Appellee failed to furnish the requisite measure of proof to establish appellant's guilt and has asked the court to overlook this *failure of proof* and convict appellant on surmises or inferences, the last being that no stamps were affixed to the drugs referred to in the information. This surmise, assumption or inferences—whatever we want to call it—does not relate to a casual, collateral matter but relates rather to the very crux of the case, the heart of the case, the *sine qua non*. Counsel has offered no excuse for not making this requisite proof, merely saying in his brief (page

3) that it is obvious that stamps could not be attached to capsules in a commode. We do not know that this is so. Certainly, the court cannot take judicial notice that this is so.

Here we meet again with the presumption of defendant's innocence. It stands counterposed to the surmise or assumption or inference counsel wishes the court to make. When one or the other must give way, the presumption of innocence or the presumption of guilt, we feel sure this court will not hesitate to declare in favor of the fundamental concept of justice firmly embraced as the pole star in the administration of criminal law in this country. Appellant is probably not important as an individual, but the primary point of law presented here is of the utmost importance. One dislikes to contemplate the probable consequence, in other cases or at other times, if the stamp of judicial approval is put on this laxity on the part of the prosecution, in proving by competent evidence the guilt of accused beyond all reasonable doubt. The house where the officers entered and searched, 3237 Nimitz highway, was occupied by several people (R. p. 121). The officers did not know who the legal tenant was and apparently did not know if appellant lived there or elsewhere. It will be recalled when officers entered the house she was by the toilet bowl and the officers said she was apparently trying to flush the toilet, to dispose of the capsules (R. p. 18). When the evidence was in and the case submitted, counsel for appellant in argument, stated that the evidence indicated she had possession of the

drug, because of her nearness to it (R. p. 21). (Mere possession is no offense—*Linder v. U. S.*, 268 U.S. 5, 45 Sup. Ct. 446). The point counsel wished to make was that possession or ownership are two different things; that the real offender was the owner—who was not defendant (R. p. 17). This argument after trial has no place in the record and we would not have referred to it but for counsel's attempt to use it against appellant.

Counsel for appellee summarizes his position on page 6 of his brief in four numbered paragraphs, which we will comment on in their order.

1. When possession by the defendant of *unstamped narcotics* has been proved, the burden is on defendant to show lawful possession.

Comment: In this case there was no evidence, oral, physical or demonstrative that the drugs in question were *unstamped*.

2. The defendant freely admitted the narcotics were in her possession.

Comment: Defendant made no such admission at any time. On page 2 of his brief, counsel correctly states: "The defendant made no statement incriminating herself and did not take the stand." (And Narcotic Officer Wells testified (R. p. 16), "We took the defendant down to the vice squad office, warned her of her rights and she refused to answer any question." There is no excuse for this statement by counsel.

3. Her possession of the narcotics, unexplained, as a matter of law, is *prima facie* evidence of violation of the statute.

Comment: We have already discussed this point at some length and will not repeat it here, except to say that if the prosecution had produced any evidence of any kind to prove that the drugs were unstamped, counsel's statement of law would be correct.

4. Under the *Casey* case the venue is in the territory where the drugs were found.

Comment: We discussed the *Casey* case and quoted from it in our opening brief (Brief p. 8) and we submit the question of venue on our presentation of it there.

We submit there has been a failure of proof. Appellant stood before the trial court shielded and protected by the presumption of innocence. The prosecution was required to prove every essential element of the offense, by evidence which the law recognizes as competent; and the failure of the appellee to prove the *sine qua non*—that the drugs were unstamped—leaves the court with but a single duty—to give force and effect to the presumption of innocence and sustain this appeal; and it is so moved.

Dated, Honolulu, Hawaii,

July 6, 1951.

Respectfully submitted,

E. J. BOTTS,

Attorney for Appellant.

No. 12844

United States
Court of Appeals
for the Ninth Circuit.

GRAVELY MOTOR PLOW AND CULTIVATOR
COMPANY, a Corporation,

Appellant,

vs.

H. V. CARTER CO., INC., a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

APR 30 1951

PAUL J. O'BRIEN

No. 12844

United States
Court of Appeals
for the Ninth Circuit.

GRAVELY MOTOR PLOW AND CULTIVATOR
COMPANY, a Corporation,

Appellant,

vs.

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Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Superior Court of the State of California,
in and for the City and County of San Francisco

Civil Action No. 362371

H. V. CARTER CO., INC.,

Plaintiff,

vs.

GRAVELY MOTOR PLOW AND CULTIVATOR COMPANY, a Corporation; GRAVELY MOTOR PLOW AND TRACTOR CO., INC., a Corporation; GRAVELY-PACIFIC, INC., a Corporation; FIRST DOE COMPANY, SECOND DOE COMPANY, and THIRD DOE COMPANY, Corporations,

Defendants.

COMPLAINT FOR DAMAGES (BREACH OF CONTRACT)

Comes now plaintiff and for cause of action against defendant and each of them alleges:

I.

Plaintiff is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of California, and authorized to do, and doing business within the State of California, and having its principal place of business in the City and County of San Francisco.

II.

That defendant, Gravely Motor Plow and Cultivator Company, is a corporation organized under

the laws of the State of West Virginia and is now and has been during all of the times hereinafter mentioned doing business within the State of California; said company will hereinafter be referred to for the sake of convenience as "Gravely."

III.

That Gravely Motor Plow and Tractor Co. Inc., is a corporation organized under the laws of the State of West Virginia and has been doing business within the State of California since the time of its incorporation.

IV.

Gravely-Pacific Inc., is a corporation organized under the laws of the State of West Virginia and is now and has been since its incorporation, to-wit December 30, 1944, doing business within the State of California; said corporation, as plaintiff is informed and believes and therefore alleges, is a wholly owned subsidiary of Gravely whose officers and directors are identical or almost identical with the officers and directors of Gravely and all of whose capital stock is owned by Gravely and that said corporation was organized for the purpose of establishing a separate sales outlet for Gravely in California; that for the sake of convenience said corporation will hereinafter be referred to as "Pacific."

V.

Plaintiff is informed and believes and therefore alleges that First Doe Company, Second Doe Company and Third Doe Company are corporations do-

ing business in California, but is unaware of their true names or of the state of their incorporation and requests leave of the Court to insert such facts when and if the same are ascertained.

VI.

That plaintiff has been engaged for many years and now is engaged in the business of selling farm, garden, golf course, air field and similar kinds of supplies and equipment including garden and farm tractors, rotary plows and attachments, hand and power lawn mowers together with insecticides, fertilizers and like products; that plaintiff is a dealer and/or jobber and/or distributor of such merchandise and represents, and has for many years represented, the various manufacturers of the above-described and like products within the State of California; that plaintiff maintains complete sales quarters, repair shops, service and assembling departments for the storage, maintenance, repairing, assembling, displaying and selling of the products described above in connection with the operation of its business at San Francisco, California; that in addition thereto plaintiff employs a large number of persons in connection with the selling, servicing and repairing of said products and its salesmen cover the territory of Northern California and call upon both the retail trade as well as the ultimate consumers insofar as farm, golf course, air field and public park equipment is concerned.

VII.

That on or about the 7th day of December, 1925, at San Francisco, California, plaintiff's predecessor, H. V. Carter Company, entered into a written contract at San Francisco, California, with Gravely wherein Gravely granted to said H. V. Carter Company "the sole and exclusive right and privilege of selling Gravely Motor Cultivators, accessories and parts in that part of the State of California North of the sixth standard parallel South"; that said contract provided that it should be effective until such time as either party should give thirty days written notice to the other party of its cancellation; that said contract has never been cancelled by either party to it or by plaintiff as the successor of H. V. Carter Company and that ever since the date of said contract plaintiff has been and now is the exclusive dealer for all of the products manufactured by Gravely for the Northern California territory; that a copy of said contract is attached hereto marked "Exhibit A" and made a part hereof.

VIII.

That in connection with plaintiff's appointment as a dealer and distributor of Gravely products it has been required to and it does now maintain a sales and service personnel that is thoroughly familiar with Gravely products and are able to instruct purchasers of such equipment in the operation and maintenance thereof; it has further been necessary for plaintiff to maintain and it does now maintain adequate and independent display space

in its sales rooms for the display of said Gravely products together with adequate service and repair facilities together with trained personnel necessary to the sales, servicing and assembling of said products.

IX.

That shortly after the commencement of the Second World's War Gravely discontinued shipping its products to plaintiff and advised plaintiff that it was forced to do this for the reason that it was engaged in the manufacturing of war equipment for the United States Government and that it was unable to continue to supply its products to dealers, distributors, jobbers and other users as it had formerly done.

X.

That during said war years, to-wit 1942, 1943, 1944 and 1945 plaintiff notified its customers that it could not supply them with many of the products theretofore sold to them because of the advent of the war but did, as was the custom of many dealers, take orders from its customers for many products, including Gravely products, said orders being taken on the basis that as soon as the manufacturer who plaintiff represented commenced to manufacture such products after reconversion from war time activities, that such orders would be filled in the order of their priority; that as a result thereof plaintiff continued to receive and solicit orders from its customers for certain products including Gravely products on such basis and sent such orders into the various manufacturers that it represented, includ-

ing Gravely; that specifically plaintiff forwarded to Gravely, at its factory at Dunbar, West Virginia, forty-eight specific and individual orders for Gravely tractors and supplemental attachments within the past two and one-half years and did on July 3, 1946, place an order with Gravely for the purchase of a carload of Gravely tractors, said order bearing order number 31493, and that said carload lot contained forty-five tractors; that defendant Gravely, received and accepted all of said orders and acknowledged receipt of same and in no way did it notify or advise plaintiff that it would not accept said orders or that it would not deliver said tractors to plaintiff in fulfillment of said orders at such time as it became re-engaged in the manufacture thereof.

XI.

That for more than eighteen months last past, the exact date of the commencement of which is unknown to plaintiff, defendant, Gravely, has manufactured tractors and other products as described above and has supplied and delivered said tractors and other products to other dealers, jobbers, distributors and users throughout the United States and has also supplied and delivered such products to its wholly owned subsidiary, Pacific, in California and has delivered tractors to customers of plaintiff within Northern California upon orders forwarded to Gravely by plaintiff on behalf of such customers, but has failed and refused, and continues to fail and refuse to pay the commissions justly due

plaintiff thereon or to deliver or supply its products to plaintiff, including tractors and supplementary attachments, in fulfillment of plaintiff's orders hereinabove described and in violation of plaintiff's exclusive contract with Gravely, copy of which is set forth herein as "Exhibit A"; that plaintiff is informed and believes and therefore alleges that defendant, Gravely, in order to avoid meeting its obligations to plaintiff for compensation, commissions or other emoluments and in order to circumvent the fulfillment of plaintiff's orders for tractors received during the past two and one-half years and in order to further avoid the payment to plaintiff of commissions properly due it in connection with the sale of said tractors for which said orders were placed as described above, organized said Pacific as a wholly owned subsidiary and established the same in California purportedly as an independent dealer and distributor for Gravely products and has, since the establishment of said Pacific, satisfied orders received by it and has delivered tractors and other products to it for distribution to the trade and to plaintiff's customers; that such actions on the part of Gravely are in violation of the laws of the United States and the laws of the State of California; that in truth and in fact Pacific and Gravely are one and the same company having substantially the same officers and directors; that all of the issued and outstanding capital stock of Pacific is owned by Gravely; that in effect Gravely is selling its products directly to the trade through the use of its wholly owned subsidiary

Pacific and is collecting the full retail price for its products as a result thereof.

XII.

That by reason of the foregoing plaintiff has been damaged in an amount made up of the following items:

(a) Commissions due plaintiff upon the sale of ninety-three tractors and attachments at the rate of \$120.00 per tractor or \$11,160.00.

(b) Monies expended in altering and remodeling plaintiff's sales and service rooms in connection with the proper display, servicing and repairing of Gravely products in the sum of \$3000.00.

(c) General damages to plaintiff's reputation and standing with its customers, by its inability to fulfill long-standing orders placed with it in good faith for Gravely products, in the sum of \$10,000.00.

Wherefore, plaintiff prays judgment against the defendants and each of them for damages in the sum of \$24,160.00, together with its costs of suit incurred herein and for such other and further relief as the Court may deem meet and proper.

/s/ DAVID FREIDENRICH,
Attorney for Plaintiff.

State of California,
City and County of San Francisco—ss.

D. E. Graves, being first duly sworn, deposes and says:

That he is the president of H. V. Carter Company, Inc., a corporation; that said H. V. Carter

Company, Inc., is the plaintiff in the foregoing action; that he has read the foregoing complaint and knows the contents thereof. The same is true of his own knowledge, except as to matters which are therein stated on his information or belief and as to those matters, he believes it to be true.

/s/ D. E. GRAVES,

Subscribed and sworn to before me this 24th day of January, 1947.

[Seal] /s/ LOUIS WIENER,

Notary Public, in and for the City and County of San Francisco, State of California.

EXHIBIT A

This Agreement, Made and entered into this 7th day of December, 1925, by and between the Gravely Motor Plow and Cultivator Company, a corporation, of Dunbar, West Virginia, party of the first part, and H. V. Carter Company, of San Francisco, California, party of the second part.

Witnesseth: That for and in consideration of the conditions herein, the said party of the second part hereby agrees to purchase from the said party of the first part Five Gravely Motor Cultivators, and to pay therefor the sum of \$190.00 each, f. o. b. Dunbar, West Virginia, less distributors discount of twenty-five and ten per cent, and the said party of the first part does hereby grant to the said party of the second part the sole and exclusive right and privilege of selling the Gravely Motor Cultivator,

accessories, and parts in that part of the State of California North of the 6th standard parallel South.

This Agreement, to be effective as long as is mutually satisfactory to the parties hereto and may be canceled by either, giving 30 days written notice to the other.

Terms:—Net cash on receipt of invoice or Trade Acceptance payable 60 days from date of invoice.

It is specifically understood and agreed between the parties hereto that the said party of the second part shall keep a sufficient number of cultivators and accessories and parts in stock at all times to supply a reasonable demand, and that he shall use his best efforts to push the sale of said cultivators.

It is agreed that any parts on hand with the second party at the expiration of this agreement may be returned to the first party at Dunbar, West Virginia, by prepaid freight and first party will refund to second party the original cost of such parts to second party.

Guarantee: All Gravely Motor Cultivators are guaranteed to second party by first party to be made in a workmanlike manner and free from defective material or workmanship. This guarantee to become effective the date the tractor is sold to the consumer and to extend for a period of 90 days. All defective parts will be replaced free providing such parts are returned to factory of first party with changes prepaid and when on examination show clearly they are defective.

It is further mutually agreed and understood between the parties hereto that all orders for ma-

chines and accessories and parts under this contract are made by the said party of the second part and accepted by the said party of the first part subject to strikes, accidents, transportation tieups, and any and all other causes beyond the control of the said party of the first part.

In Witness Whereof, the parties hereto have hereunto affixed their signatures this 7th day of December, 1925.

GRAVELY MOTOR PLOW
AND CULTIVATOR
COMPANY,

By /s/ L. H. WEBER,
H. V. CARTER COMPANY,
First Party.

By /s/ D. E. GRAVES,
Second Party,
Distributor.

[Endorsed]: Filed Superior Court February 13, 1947.

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO
THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

The petition of Gravelly Motor Plow and Cultivator Company, a corporation, and Gravelly-Pacific,

Inc., a corporation, respectfully shows and represents to this Honorable Court:

I.

The petitioners appear herein specially and solely for the purpose of removing said cause to the United States District Court in and for the Northern District of California, Southern Division.

II.

The above-entitled action has been brought in this Court and is now pending therein, and the time within which said defendants are required to answer or otherwise plead has not yet expired.

III.

Said cause of action is of a civil nature, being an action to recover amounts alleged to be due plaintiff from defendants for alleged breach of contract. Said action is one of which the United States District Courts are given jurisdiction, as will appear from the allegations of this petition and the complaint on file herein.

IV.

The value of the matter in controversy in the said action is in excess of three thousand dollars (\$3,000), exclusive of interest and costs, as appears from the allegations of plaintiff's complaint on file herein.

V.

The controversy in said action is, and at the time of the commencement of said action was, entirely between citizens of different states, in that your

petitioners were at the time of the commencement of said action and still are corporations duly organized and existing under the laws of the State of West Virginia and are, and each of them is, a citizen of said State; and plaintiff in the above-entitled action was at the time of the commencement of said action and still is a corporation organized and existing under the laws of the State of California and a citizen of said State.

VI.

Plaintiff has fraudulently and improperly joined First Doe Company, Second Doe Company and Third Doe Company, corporations, as co-defendants with your petitioners for the sole purpose of attempting to defeat the jurisdiction of the courts of the United States and the right of your petitioners to remove this cause to said court; that the joining of said defendants First Doe Company, Second Doe Company and Third Doe Company as co-defendants with your petitioners is not made in good faith for the purpose of obtaining a judgement against said defendants, as no cause of action is stated or attempted to be stated against said defendants First Doe Company, Second Doe Company and Third Doe Company.

VII.

Your petitioners present herewith a good and sufficient bond, as provided by the statute in such cases, that it will enter in the District Court of the United States, for the Northern District of California, Southern Division, within thirty (30) days from the

date of filing this petition, a certified copy of the record in this action and that it will pay all costs which may be awarded by the said District Court in case the said Court shall hold that this action was wrongfully or improperly removed thereto.

Wherefore, your petitioners pray that this Court proceed no further herein, excepting to make an order accepting the bond presented herewith and directing that a transcript of the record herein be made for filing in the United States District Court for the Northern District of California, Southern Division.

GRAVELY MOTOR PLOW AND
CULTIVATOR COMPANY.

By D. RAY HALL,

Pres.

GRAVELY-PACIFIC, INC.,
By D. RAY HALL,

Pres.

Petitioners.

SAMUEL S. STEVENS,
HELLER, EHRMAN, WHITE &
McAULIFFE,
Attorneys for Petitioners.

State of West Virginia,
County of Kanawha—ss.

D. Ray Hall, being first duly sworn, deposes and says:

That Gravely Motor Plow and Cultivator Company, one of the defendants in the above-entitled action and one of the petitioners named in the above and foregoing petition, is a corporation; that affiant is an officer, to wit, president of said corporation, and as such he is authorized to and does make this verification for and on behalf of said corporation; that affiant has read the above and foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated on information or belief, and as to those matters he believes it to be true.

D. RAY HALL.

Subscribed and sworn to before me this 8th day of March, 1947.

[Seal] · ILMA HOLSCLOW,
Notary Public in and for the County of Kanawha,
State of West Virginia.

My commission expires January 27, 1951.

[Endorsed]: Filed Superior Court, March 17, 1947.

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL

This cause coming on for hearing upon petition and bond of the defendants Gravely Motor Plow and Cultivator Company, a corporation, and Gravely-Pacific, Inc., a corporation, for an order transferring this cause to the United States District Court, Northern District of California, Southern Division, and it appearing to the court that said defendants have filed their petition for such removal in due form of law and that said defendants have filed their bond duly conditioned with good and sufficient sureties as provided by law, and that said defendants have given plaintiff due and regular notice thereof, and it appearing to the court that this is a proper cause for removal to said United States District Court;

Now, Therefore, said petition and bond are hereby accepted, and it is hereby Ordered and Adjudged that this cause be and it is hereby removed to the United States District Court, Northern District of California, Southern Division, and the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Done in open court this 17 day of March, 1947.

HERBERT C. KAUFMAN,
Judge of the Superior Court.

[Endorsed]: Filed Superior Court, March 17,
1947.

[Title of Superior Court and Cause.]

CERTIFICATE OF CLERK

I, Robert Munson, County Clerk of the City and County of San Francisco, and ex-officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify the above and foregoing is a full, true and complete record of the transcript of record, and the whole thereof, in the above-entitled suit heretofore pending in said Superior Court, being suit No. 362371, wherein H. V. Carter Co., Inc., is plaintiff, and Gravely Motor Plow and Cultivator Company, a corporation, Gravely Motor Plow and Tractor Co., Inc., a corporation, Gravely-Pacific, Inc., a corporation, First Doe Company, Second Doe Company and Third Doe Company, corporations, are defendants, and said record consists of:

(1) Complaint for Damages (Breach of Contract);

(2) Notice of Filing of Petition and Bond for Removal to the United States District Court, Northern District of California, Southern Division;

(3) Petition for Removal of Cause to the United States District Court, Northern District of California, Southern Division;

(4) Notice of Order for Removal;

(5) Affidavit of Service;

(6) Order for Removal.

Witness my hand and seal this 15th day of April, 1947.

[Seal] ROBERT MUNSON,
County Clerk and Ex-Officio Clerk of the Superior
Court in and for the City and County of San
Francisco, State of California.

By /s/ F. FOURNIER,
Deputy Clerk.

[Endorsed] Filed U. S. D. C. April 15, 1947.

In the District Court of the United States in and for
the Northern District of California, Southern
Division

No. 27114H

H. V. CARTER CO., INC.,

Plaintiff,

vs.

GRAVELY MOTOR PLOW AND CULTIVATOR
COMPANY, a Corporation, GRAVELY
MOTOR PLOW AND TRACTOR CO., INC.,
a Corporation, GRAVELY-PACIFIC, INC.,
a Corporation, FIRST DOE COMPANY, SEC-
OND DOE COMPANY and THIRD DOE
COMPANY, corporations,

Defendants.

NOTICE OF MOTION OF DEFENDANT
GRAVELY MOTOR PLOW AND CULTI-
VATOR COMPANY, a Corporation, TO
QUASH SERVICE OF SUMMONS AND
TO DISMISS SUIT AS TO SAID DEFEND-
ANT

To H. V. Carter Co., Inc., plaintiff herein, and to
David Freidenrich, Esq., its attorney:

You, and Each of You, Are Hereby Notified that
Gravely Motor Plow and Cultivator Company, a
corporation, one of the defendants in the above-
entitled action, will, on Monday, the 28th day of
April, 1947, at the hour of 10:00 a.m., of said day,
or as soon thereafter as counsel may be heard, ap-

pearing specially for this purpose and for no other purpose, move the above-entitled court, Honorable George B. Harris, Judge thereof, for an order to quash the service of summons on said defendant Gravely Motor Plow and Cultivator Company and to dismiss the action as to said defendant.

Said motion will be made on the grounds:

(1) That said defendant is a corporation organized under the laws of the State of West Virginia, and said corporation was not and is not subject to service of process within the State of California and that said defendant has not been properly served with process in this action;

(2) That said defendant is a corporation organized under the laws of the State of West Virginia, and is not now nor has it ever been doing business in the State of California and is not subject to the jurisdiction of this Court.

Said motion will be based on the affidavits of D. Ray Hall and John W. Heinen, copies of which are attached hereto, marked Exhibit "A" and Exhibit "B," respectively, which affidavits are by this reference made a part hereof.

Dated: April 16, 1947.

/s/ SAMUEL S. STEVENS,
HELLER, EHRMAN, WHITE
& McAULIFFE,

Attorneys for Defendant, Gravely Motor Plow and
Cultivator Company.

EXHIBIT A

[Title of District Court and Cause.]

AFFIDAVIT OF D. RAY HALL

State of West Virginia,
County of Kanawha—ss.

D. Ray Hall, being duly sworn, deposes and says:

That he is an officer, to-wit, President, of Gravely Motor Plow and Cultivator Company, a West Virginia corporation, with its principal place of business in Dunbar, West Virginia, one of the defendants named in the above-entitled action; that said corporation does not now maintain nor has it ever maintained an office or place of business, of any nature or description, within the State of California; that said corporation does not now transact nor has it ever transacted business within the State of California; that said corporation has no employees, officers, agents, or other representatives residing in or doing business within the State of California; that said corporation has never complied with the laws of the State of California relating to foreign corporations, and has never designated an agent for the service of process or authorized any agent or person to receive service of process within the State of California; that said corporation has no stock of merchandise within the State of California; that said corporation has no bank accounts or any other property of any nature or description within the State of California;

That affiant has been advised that a copy of the

summons and complaint in the above-entitled action was delivered to John W. Heinen, in the County of Los Angeles, State of California, on the 17th day of February, 1947; that John W. Heinen is not now nor has he ever been an officer, employee, agent, or other representative of Gravely Motor Plow and Cultivator Company, nor has said John W. Heinen at any time been authorized to accept or receive service of summons against said Gravely Motor Plow and Cultivator Company;

That affiant has been advised and so states that the only service of process on the defendant Gravely Motor Plow and Cultivator Company in the above-entitled action is the attempted service of process on said John W. Heinen on the 17th day of February, 1947, in the County of Los Angeles; affiant has been further advised and so states that plaintiff claims to have acquired jurisdiction of defendant Gravely Motor Plow and Cultivator Company by serving a copy of the summons and complaint on John W. Heinen, a representative of defendant Gravely-Pacific, Inc., for the reason that Gravely Motor Plow and Cultivator Company is the owner of substantially all the issued and outstanding capital stock of defendant Gravely-Pacific, Inc.;

That affiant further states that he is an officer, to wit, President of Gravely-Pacific, Inc., a corporation, the defendant named in the above-entitled action; that said corporation is organized under the laws of the State of West Virginia, and is now and since the 4th day of September, 1945, has been qualified to do business in the State of California;

that Gravely-Pacific, Inc. has issued and outstanding twenty-three shares of common stock of the par value of \$100 per share, of which shares Gravely Motor Plow and Cultivator Company is the owner of twenty, and affiant, Sibyl Hall, his wife, and Kenneth Thomas are and each of them is the owner of one of said shares.

/s/ D. RAY HALL.

Subscribed and sworn to before me this 31st day of March, 1947.

[Seal] /s/ ILMA HOLSCLOW,
Notary Public in and for the County of Kanawha,
State of West Virginia.

My commission expires January 27, 1951.

EXHIBIT B

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN W. HEINEN

State of California,
City and County of San Francisco—ss.

John W. Heinen, being duly sworn, deposes and says:

That he is an employee, to wit, Manager of Gravely-Pacific, Inc., a corporation, one of the defendants in the above-entitled action; that said corporation is organized under the laws of the State of West Virginia and is duly and regularly qualified to do business in the State of California;

That a copy of the summons and complaint in the above-entitled action was served on affiant on the 17th day of February, 1947; that affiant is not now nor has he ever been an officer, agent, representative, or employee of Gravely Motor Plow and Cultivator Company, nor has affiant ever been authorized to accept or receive service of process in the State of California against Gravely Motor Plow and Cultivator Company.

/s/ JOHN W. HEINEN.

Subscribed and sworn to before me this 9th day of April, 1947.

[Seal] /s/ CATHERINE E. KEITH,
Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 17, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF D. E. GRAVES IN OPPOSITION TO MOTION OF GRAVELY MOTOR PLOW AND CULTIVATOR COMPANY TO QUASH SERVICE OF SUMMONS, ETC.

State of California,
City and County of San Francisco—ss.

D. E. Graves, being first duly sworn, deposes and says:

That he is an officer, to wit, President, of H. V.

Carter Co., Inc., a California corporation having its principal place of business in the City and County of San Francisco, State of California, and plaintiff herein.

Affiant is now and has been the active manager of the business and affairs of plaintiff since its inception as a corporation more than ten years ago and for a long period of time prior thereto, when said company was unincorporated.

Affiant denies that defendant Gravely Motor Plow and Cultivator Company has never done business within the State of California or that it has no employees, agents, or representatives in California as sworn to in the affidavit of D. Ray Hall, the president of said defendant; that in truth and in fact said defendant has for a long period of time had direct dealings with persons and firms in California regarding the sale, purchase, and shipping of said defendant's products to said persons and firms within the State of California; that the names and addresses of some of the persons and firms with which said defendant has had direct dealings in California over an extended period of time are as follows:

Willard H. Johnson, of Santa Cruz, California;
Shell Oil Company, San Francisco, California;
K. S. Gordon, Paradise, California;
A. S. Borso, Vallejo, California;
W. R. Graham, Paradise, California;
L. P. Moore, Richmond, California;

that in addition thereto affiant states that on August

23, 1946, plaintiff received from John W. Heinen, as manager of Gravely-Pacific, Inc., a letter, copy of which is attached hereto and marked Exhibit A, wherein the said Heinen attempted to terminate plaintiff's relationship as a dealer with the defendant Gravely Motor Plow and Cultivator Company;

That thereupon affiant on behalf of plaintiff and on August 30, 1946, replied to said letter of August 23, 1946, copy of which reply is attached hereto and marked Exhibit B; that on said day affiant also dispatched a letter to the defendant Gravely Motor Plow and Cultivator Company, copy of which is likewise attached hereto and marked Exhibit C;

That thereafter and on September 10, 1946, affiant received a reply from the defendant Gravely Motor Plow and Cultivator Company dated September 5, 1946, wherein said defendant admitted that the said Heinen was acting on its instructions when he sent his letter of August 23rd to plaintiff; said letter of September 5, 1946, also states that said defendant was notifying the said Heinen to "attempt to secure another dealer" in the place of plaintiff for the sale of said defendant's products in the Northern California area; that a copy of said letter of September 5, 1946, is attached hereto and marked Exhibit D;

That said defendant Gravely Motor Plow and Cultivator Company admits in the affidavit of its president, D. Ray Hall, that it owns twenty out of twenty-three shares representing all of the outstanding stock of Gravely-Pacific, Inc., and that the other three shares are owned by Hall, his wife,

Sybil Hall, and Kenneth Thomas; that in said affidavit the said D. Ray Hall admits that he is the president of defendant Gravely-Pacific, Inc., as well as being the president of defendant Gravely Motor Plow and Cultivator Company; that the said Kenneth Thomas is an officer and director of defendant Gravely Motor Plow and Cultivator Company, to wit, secretary, and is also an officer and director of defendant Gravely-Pacific, Inc., to wit, its treasurer; that in addition thereto A. Garnett Thompson is a director and officer of the defendant Gravely-Pacific, Inc., to wit, its secretary, and is also the attorney for and a director of defendant Gravely Motor Plow and Cultivator Company; that it will be noted from Exhibits A and D that the general makeup of the letterheads of defendants Gravely Motor Plow and Cultivator Company and Gravely-Pacific, Inc., are identical save and except that one bears the name of one defendant and one bears the name of the other;

That affiant is informed and believes and therefore avers that defendant Gravely-Pacific, Inc., is the only one of nineteen similar subsidiary corporations owned, controlled, directed and operated by the defendant Gravely Motor Plow and Cultivator Company and which act exclusively as distributing agents for the parent company in various localities throughout the United States and that all of said subsidiary corporations were incorporated by the parent company in the State of West Virginia and that the expenses necessary to the incorporation of said subsidiary companies were paid by said parent

company, to wit, defendant Gravely Motor Plow and Cultivator Company, and that the sole capital contribution paid into each of these subsidiary corporations was contributed by said parent company;

That the said John W. Heinen is not an officer of Gravely-Pacific, Inc., but is an employee thereof and acts as the manager of said company in California; that all of the officers of said company reside in the State of West Virginia and are officers and directors of the defendant Gravely Motor Plow and Cultivator Company; that said Heinen as manager of the California office acts under the complete control and direction of the defendant Gravely Motor Plow and Cultivator Company, by and through its officers and directors.

/s/ D. E. GRAVES,

Affiant.

Subscribed and sworn to before me this 25th day of April, 1947.

[Seal] /s/ LOUIS WIENER,

Notary Public in and for the City and County of San Francisco, State of California.

Exhibit A

Gravely Power Equipment
For

Lawn, Garden and Field

Telephone: Citrus 1-7321

Gravely Pacific, Inc.

Distributing Agents

623 South Glendale Avenue

Glendale 5, California

August 23, 1946

H. V. Carter Co., Inc.

Mr. D. E. Graves,

President,

52 Beale St., San Francisco, Cal.

Dear Mr. Graves:

First I want to congratulate you on your progress in modernizing and improving your Sales Room. Your company is one to be proud of and I know shall always operate with success.

It is apparent, however, Mr. Graves, that you have not and do not intend to go ahead with our instructions, as outlined to you at our conference with your assistant, during my last trip to San Francisco. It simply is this, Mr. Graves, that your setup is not the proper place for handling Gravely Products under our distribution plan.

We have arrived at the conclusion that it would for the best of all concerned to release you from further obligation in handling Gravely Products. You have done a grand job in the past with what

you have received, and we greatly appreciate your cooperation in so many instances.

You may consider this letter an abrogation of any contractual obligations you may have felt you had with us or with our factory.

I believe you have realized all along that this break must come and that you will see our point of view in establishing a new outlet for Gravely.

With very best regards.

Sincerely your,

/s/ JOHN W. HEINEN,
Manager.

JWH:ps

Exhibit B

August 30, 1946

Gravely Pacific, Inc.
623 So. Glendale Ave.
Glendale 5, California

Attention: Mr. John W. Heinen, Manager

Gentlemen:

Your letter of the 23rd releasing us from obligations to handle Gravely products seems clear in its intent, altho it is confusing, in the light of things.

There is no formal contract between Gravely Pacific, Inc., and H. V. Carter Co., Inc., as you advised us you had not sent the contract to the factory, who were jointly concerned in the contract. We, therefore, consider that document ineffective, in view of your action on the matter and your expressions relating thereto.

The relationships between us have been on the basis of prior contracts, mutual understanding, correspondence and good faith, existing over a period of many years. On this basis, we have proceeded in the securing of orders for Gravely tractors and equipment, have continued to encourage our customers to place their orders with us for Gravelys on the basis of our mutual understandings and have rendered mechanical and other services to the customers and owners.

As we wrote you recently, we have modernized the first floor of our building and have made a very attractive place to exhibit and from which to sell Gravely tractors, when we have some to show and sell.

We wrote you when we sent you the contract together with an order directed to you and Gravely Company at Dunbar, for a carload of Gravely tractors and equipment, that "It is our plan to conform to the general sales and service policy of the Gravely factory and Gravely Pacific and to this end we extend you our full cooperation."

In response to it, you wrote and congratulated us and expressed your appreciation of our cooperative spirit, etc. Therefor, we repeat that your letter of August 23rd is confusing.

You will concede that our opinion and that of our attorney, to the effect we could not release either Gravely-Pacific or the Gravely firm at Dunbar, from filling our orders already placed, is logical.

We have accepted the orders from the customers

and have in turn placed our orders with the factory and with Gravely-Pacific, for tractors and equipment with which to fill these orders. It is needless to go into details, as to the loss we would incur if we did not supply the tractors and equipment already sold to the customers.

A copy of this letter is being sent to Dunbar, so that we can all have a full understanding of the position we assume in view of your comments which came to us as quite a surprise.

We await your further communications with interest.

Sincerely yours,

H. V. CARTER CO., INC.

DEG:LW

Exhibit C

Aug. 30, 1946

Gravely Motor Plow & Cult. Co.

Dunbar, West Virginia

Attention: Mr. Kenneth Thomas, Secretary

Gentlemen:

In view of the fact, the correspondence with your Dunbar headquarters office during the past months has been conducted with you, we are writing you relative to the letter written us by Mr. Heinen of the Gravely-Pacific. This was quite disconcerting, coming as it did after about 20 years relationships.

Enclosed is a copy of the letter we wrote in reply to Mr. Heinen and in which we tried to be as clear as possible in stating our objectives and position.

The contract we sent to Glendale was voided, as Mr. Heinen advised he did not send it for your approval, so we will disregard that document. However, the order for the carload of tractors and equipment, of which order we enclose a copy was directed to you and to Gravelly Pacific jointly and individually.

We enclose a copy of the letter we sent with the contract and order, all of which together with our letter of this day to Glendale seems to place the matter before you clearly.

Without doubt, you have a copy of the letter written us by Mr. Heinen on August 23rd. With this data before you and your officials, you will be in position to write us your comments.

Very truly yours,

H. V. CARTER CO., INC.

DEG:LW

Enclosure

Exhibit D

Gravely Power Equipment
For
Lawn, Garden and Field

Telephone: 81-234

Gravely Motor Plow & Cultivator Company
Manufacturers
Dunbar, W. Va., U. S. A.

Sept. 5, 1946

D. E. Graves
H. V. Carter Company, Inc.
52 Beale Street
San Francisco 5, California

Dear Mr. Graves:

It is right that I should reply to your letter of August 30th addressed to the attention of Mr. Thomas, for I so well recall my conversation with you back here when you visited us. I think I was quite plain in telling you what the Gravely Pacific or the Gravely Motor Plow either would require in case we would continue with you. As pointed out you handled too many competitive lines and that you could not expect us to continue unless you did certain things. One of these was to put a separate store and organization on Gravely alone. You hedged on this, but finally promised in an indirect manner that you would. Now, Mr. Heinen reports that you had not done this and it was upon my suggestion that he notify you that you could not continue.

There seems but little else to say. Your inference that this is a matter for a lawyer to determine does not set too well with me. The only way you could retain the agency would be to handle it right and that you show you don't intend to do.

The letter I have here will bear out what I have said above.

I am sending a copy of this to Mr. Heinen and I am suggesting to him that he attempt to secure another dealer in that area. On the orders that you actually have for Gravely I would suggest that you inform the customers you no longer have the agency and give them the opportunity of ordering from the new dealer or to cancel the order.

Yours sincerely,

GRAVELY MOTOR PLOW
AND CULTIVATOR COM-
PANY

By /s/ D. RAY HALL,
President.

[Endorsed]: Filed April 26, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF EDWIN F. HINER

State of West Virginia,
County of Kanawha—ss.

Edwin F. Hiner, being duly sworn, deposes and says:

That he is an employee, to wit, managing director, of Gravely Pacific, Inc., a West Virginia corporation, with its principal place of business in South Charleston, West Virginia, said corporation being one of the above-named defendants; that he has held said position of managing director since November 1, 1945; that he has not held any office or position whatsoever with Gravely Motor Plow and Cultivator Company, a corporation, one of the above-named defendants, at any time since he has held said position of managing director; and that as such managing director he has general charge of the affairs of Gravely Pacific, Inc.

Affiant further says that the relations between said Gravely Pacific, Inc., and said Gravely Motor Plow and Cultivator Company are governed entirely by written contract dated the 1st day of January, 1945, as modified by written contract dated the 1st day of January, 1946, entered into by and between Gravely Motor Plow and Cultivator Company and Gravely Pacific, Inc.; that all of the books and records of said two corporations are kept at different locations and are entirely separate and distinct; that no officer or employee of said Gravely Motor Plow and Cultivator Company, as such officer or employee, has any authority or control whatsoever over said Gravely Pacific, Inc., or its affairs; that shipments of merchandise by Gravely Motor Plow and Cultivator Company to Gravely Pacific, Inc., are made by freight, express, truck or parcel post, as circumstances dictate, on a thirty day net cash

basis; and that payment therefor is made by Gravely Pacific, Inc., by check in due course.

Affiant says further that no officer or employee of said Gravely Pacific, Inc., as such, has any rights or duties in relation to Gravely Motor Plow and Cultivator Company; and that neither said Gravely Pacific, Inc., nor any of its officers or employees, has any authority to act for or to bind said Gravely Motor Plow and Cultivator Company in the absence of express authorization in the particular instance.

/s/ EDWIN F. HINER.

Subscribed and sworn to before me this 21st day of May, 1947.

[Seal] /s/ ILMA HOLSCLOW,
Notary Public in and for the County of Kanawha,
State of West Virginia.

My Commission expires January 27, 1951.

[Endorsed]: Filed May 26, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF D. RAY HALL

State of West Virginia,
County of Kanawha—ss.

D. Ray Hall, being duly sworn, deposes and says:
That he is an officer, to wit, President of Gravely Motor Plow and Cultivator Company, a West Virginia corporation, one of the defendants named in the above-entitled action that on or about January

1, 1945, said Gravely Motor Plow & Cultivator Company entered into a written agreement with Gravely Pacific, Inc., a corporation, and also one of the above-named defendants, bearing date the 1st day of January, 1945, whereby said Gravely Pacific, Inc., was given the exclusive right to sell, distribute and service, in the states of California, Nevada, Idaho, Montana and Wyoming, the garden tractors and equipment, and repair parts for the same, manufactured by Gravely Motor Plow and Cultivator Company, that on or about January 1, 1946, by written agreement of that date between said Gravely Motor Plow and Cultivator Company and Gravely Pacific, Inc., the territory within which said Gravely Pacific, Inc., should have such exclusive right to sell, distribute and service was changed to the states of California, Nevada, Arizona and Utah, said agreement of the 1st day of January, 1945, being otherwise continued in full force and effect; and that photostats of each of said two agreements referred to are hereto attached and asked to be read and considered as part of this affidavit.

Affiant further says that said agreement of January 1, 1945, was in continuous effect according to its terms until modified as aforestated by said agreement of the 1st day of January, 1946; and that as so modified it has ever since been, and now is, in full force and effect.

Affiant further says that there have been no other agreements, verbal or written, governing the relations of said two corporations, and that no officer or employee of said Gravely Motor Plow and Culti-

vator Company, as such officer or employee, has any rights or duties in connection with the control, management or operation of said Gravely Pacific, Inc.

Affiant further says that the offices of said two corporations are in different localities, and that the books of account and other records of each of said corporations are kept at its own office, by its own personnel, and are completely separate and distinct; and that the books of the two corporations are audited by different auditors.

Affiant further says that merchandise ordered from Gravely Motor Plow and Cultivator Company by Gravely Pacific, Inc., is shipped by the former to the latter by freight, truck, express or parcel post, as the circumstances may require, on terms net cash in thirty days and that payment therefor is made by Gravely Pacific, Inc., by its check, or checks, payable to Gravely Motor Plow and Cultivator Company.

/s/ D. RAY HALL.

Subscribed and sworn to before me this 21st day of May, 1947.

[Seal] /s/ ILMA HOLSCLOW,
Notary Public in and for the County of Kanawha,
State of West Virginia.

My commission expires January 27, 1951.

This Agreement, made and entered into in duplicate as of the 1st day of January, 1945, by and between Gravely Motor Plow and Cultivator Company, a corporation organized and existing under the laws of the state of West Virginia, having its chief office and place of business at Dunbar, West Virginia, party of the first part, sometimes hereinafter referred to as "manufacturer," and Gravely Pacific, Inc., a like corporation, having its chief office and place of business at Charleston, West Virginia, party of the second part, sometimes hereinafter referred to as "distributor";

Witnesseth:

That Whereas the party of the first part is engaged in the manufacture and sale of garden tractors and equipment, and repair parts for the same, at Dunbar, West Virginia, and is desirous of providing for the distribution, sales and service of its products in the territory hereinafter designated;

And Whereas the party of the second part was incorporated for the purpose of obtaining a contract for the distribution, sales and service of such products in the territory referred to;

Now Therefore, for and in consideration of the mutual agreement herein contained, it is agreed between the parties hereto as follows:

(1) The distributor is hereby given for the term of this contract, the exclusive right to sell, distribute and service the garden tractors and equipment, and repair parts for the same, manufactured by the manufacturer, in the following territory: in the

states of California, Nevada, Idaho, Montana and Wyoming.

(2) The distributor agrees to maintain a competent and aggressive sales force, and an adequate show room and repair shop; to make diligent efforts to cover such territory in connection with sales, service and repairs; and to deal exclusively in the manufacturer's products (except such other products as may be acquired by the distributor as trade-ins on the sale of the manufacturer's products).

(3) The distributor agrees to keep on hand, so far as available, samples of the manufacturer's products, and to make proper display thereof.

(4) The distributor agrees to advertise the manufacturer's products in the territory mentioned, in keeping with good business practice.

(5) The manufacturer may, if in its judgment proper, incur expenses by way of advertisement or otherwise for the purpose of promoting sales of the manufacturer's products in the hereinbefore defined territory and in such event the manufacturer may charge a reasonable proportion thereof to the distributor's account. However, no such expense shall be incurred without thirty days' prior advice of the manufacturer to the distributor, which notice shall disclose the nature and amount of the expense to be incurred, together with the proportion thereof intended to be charged against the distributor's account. If the distributor objects to the proposed charge against its account, it shall promptly in writing so advise the manufacturer, stating in full

the reasons for its objection. If the parties cannot then agree on the amount and nature of such expense, it shall not be incurred, but the manufacturer shall have the right, on sixty (60) days' written notice, to terminate this agreement.

(6) The manufacturer agrees, to the extent that is possible in view of governmental restrictions and priorities, and in so far as is justified by its facilities for manufacturing, and its markets and obligations in other territories, to supply the distributor with the manufacturer's products as required by the distributor.

(7) The distributor shall pay to the manufacturer, on such reasonable terms as may be required by the manufacturer, the list price on all products obtained from the manufacturer, less a forty per cent (40%) discount from the list price. Such products may be obtained from the manufacturer by the distributor on open account, to be settled monthly, provided the financial condition of the distributor makes such procedure sound business practice, and provided the manufacturer is allowed at all times full access to the accounts payable and receivable and such other bookkeeping and financial records of the distributor as may be deemed necessary by the manufacturer to establish the financial condition of the distributor.

(8) The manufacturer shall refer to the distributor all inquiries received from the territory mentioned, for the purchasing, servicing or repairing of the manufacturer's products.

(9) The distributor shall furnish all its own

facilities for the sale, servicing and repairing of the manufacturer's products in such territory.

(10) The distributor agrees to follow up without delay all sales or service leads in such territory furnished it by the manufacturer.

(11) Orders taken by the distributor for the manufacturer's products shall be taken in the distributor's name, except that the same may be taken in the name of the manufacturer if, and only if, any such orders are first subject to approval by the manufacturer and in any such case the distributor shall be responsible for collecting the purchase price and paying to the manufacturer the part thereof to which the manufacturer is entitled.

(12) In no case where the manufacturer's products are sold direct by the manufacturer, or by any party other than the distributor, in the territory where the distributor does not have the exclusive right of sale, shall the distributor be entitled to any commission thereon, even though the products so sold are subsequently brought into the territory in which the distributor has the exclusive right of sale.

(13) It is understood that the distributor is an independent contractor, and is not empowered in any way, shape or form to bind the manufacturer. No agreement of any kind affecting, or purporting to affect, the manufacturer shall be entered into between the distributor and any third person without the express written consent of the manufacturer in each instance. A waiver of this requirement in any particular instance shall not be considered as a waiver thereof in any subsequent instance.

(14) This agreement is to be effective from its date, until and including December 31, 1945, and thereafter until terminated by either party hereto by ninety days' written notice by registered mail to the other.

(15) In the event of any default in, or violation of, any provision of this agreement by either party hereto, continuing for a period of thirty days after written notice of default or violation, the other party hereto may thereupon terminate this agreement by written notice by registered mail to the other party.

In Witness Whereof the parties hereto have hereunto caused their respective names to be signed and corporate seals affixed.

GRAVELY MOTOR PLOW
AND CULTIVATOR CO.,

By /s/ D. RAY HALL,
Its President.

GRAVELY PACIFIC, INC.,
[Seal] By /s/ KENNETH THOMAS,
Its Treasurer.

This Agreement, made and entered into in duplicate as of the 1st day of January, 1946, by and between Gravely Motor Plow and Cultivator Company, a corporation organized and existing under the laws of the state of West Virginia, having its chief office and place of business at Dunbar, West Virginia, party of the first part, sometimes herein-

after referred to as "manufacturer," and Gravely Pacific, Inc., a like corporation, having its chief office at South Charleston, West Virginia, and its chief place of business in the state of California, party of the second part, sometimes hereinafter referred to as "distributor";

Witnesseth:

That Whereas by written agreement made between the parties hereto, bearing date January 1, 1945, the distributor was given the exclusive right, subject to the provisions of said agreement, to sell, distribute and service the garden tractors and equipment, and repair parts for the same, manufactured by the manufacturer, in certain territory designated as the states of California, Nevada, Idaho, Montana and Wyoming;

And Whereas said agreement by its terms was to be effective from its date until and including December 31, 1945, and thereafter until terminated by either party hereto by ninety days written notice by registered mail;

And Whereas the parties hereto desire that said agreement shall remain in full force and effect as to all of its terms and provisions, except as to the territory in which the distributor is given the exclusive right to sell, distribute and service such garden tractors and equipment and repair parts;

Now Therefore, for and in consideration of the premises and of the mutual agreements herein contained, it is understood and agreed between the parties hereto that said written agreement of January 1, 1945, shall remain in full force and effect

as to all of its terms and provisions except that, beginning with the date of this instrument, the territory in which the distributor is given the exclusive right to sell, distribute and service such garden tractors and equipment and repair parts shall be, instead of the territory provided in said agreement of January 1, 1945, the states of California, Nevada, Arizona and Utah.

In Witness Whereof the parties hereto have hereunto caused their respective names to be signed and their corporate seals to be affixed.

GRAVELY MOTOR PLOW
AND CULTIVATOR CO.,

By /s/ D. RAY HALL,
Its President.

GRAVELY PACIFIC, INC.,
By /s/ A. G. THOMPSON,
Its Secretary.

[Endorsed]: Filed May 26, 1947.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF
D. E. GRAVES

State of California,
City and County of San Francisco—ss.

D. E. Graves, being first duly sworn, deposes and says:

That I am an officer, to wit, the president, of H. V.

Carter Co., Inc., the plaintiff herein; that during the years 1945 and 1946 I had a great deal of correspondence with Gravely Motor Plow and Cultivator Company and with Gravely Pacific, Inc., defendants above named; that all of my correspondence with Gravely Pacific, Inc., was with John W. Heinen as its manager and all of my correspondence with Gravely Motor Plow and Cultivator Company was with D. Ray Hall, its president, and Kenneth Thomas, its secretary; that at no time during the period mentioned did I ever have correspondence or receive any communication from Edwin F. Hiner on behalf of Gravely Pacific, Inc.; that during all of said time I was never informed or advised by any of the parties enumerated above that Edwin F. Hiner had any connection with or was employed by Gravely Pacific, Inc.;

That on October 6, 1945, I visited the Gravely factory at Dunbar, West Virginia, and at that time was introduced to Edwin F. Hiner, who was then personnel manager for Gravely Motor Plow and Cultivator Company, and I had a conversation with him, but was not advised by him or by anyone else at said factory that he was to be the managing director of Gravely Pacific, Inc.; that affiant is informed and believes and upon such information and belief alleges that the said Edwin F. Hiner is an employee of Gravely Motor Plow and Cultivator Company at the present time and that he maintains his office at the factory at Dunbar, West Virginia;

That Gravely Motor Plow and Cultivator Company has always controlled and directed and created

as to all of its terms and provisions except that, beginning with the date of this instrument, the territory in which the distributor is given the exclusive right to sell, distribute and service such garden tractors and equipment and repair parts shall be, instead of the territory provided in said agreement of January 1, 1945, the states of California, Nevada, Arizona and Utah.

In Witness Whereof the parties hereto have hereunto caused their respective names to be signed and their corporate seals to be affixed.

GRAVELY MOTOR PLOW
AND CULTIVATOR CO.,

By /s/ D. RAY HALL,
Its President.

GRAVELY PACIFIC, INC.,
By /s/ A. G. THOMPSON,
Its Secretary.

[Endorsed]: Filed May 26, 1947.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF
D. E. GRAVES

State of California,
City and County of San Francisco—ss.

D. E. Graves, being first duly sworn, deposes and says:

That I am an officer, to wit, the president, of H. V.

Carter Co., Inc., the plaintiff herein; that during the years 1945 and 1946 I had a great deal of correspondence with Gravely Motor Plow and Cultivator Company and with Gravely Pacific, Inc., defendants above named; that all of my correspondence with Gravely Pacific, Inc., was with John W. Heinen as its manager and all of my correspondence with Gravely Motor Plow and Cultivator Company was with D. Ray Hall, its president, and Kenneth Thomas, its secretary; that at no time during the period mentioned did I ever have correspondence or receive any communication from Edwin F. Hiner on behalf of Gravely Pacific, Inc.; that during all of said time I was never informed or advised by any of the parties enumerated above that Edwin F. Hiner had any connection with or was employed by Gravely Pacific, Inc.;

That on October 6, 1945, I visited the Gravely factory at Dunbar, West Virginia, and at that time was introduced to Edwin F. Hiner, who was then personnel manager for Gravely Motor Plow and Cultivator Company, and I had a conversation with him, but was not advised by him or by anyone else at said factory that he was to be the managing director of Gravely Pacific, Inc.; that affiant is informed and believes and upon such information and belief alleges that the said Edwin F. Hiner is an employee of Gravely Motor Plow and Cultivator Company at the present time and that he maintains his office at the factory at Dunbar, West Virginia;

That Gravely Motor Plow and Cultivator Company has always controlled and directed and created

the policies and activities of all of its sales agencies, including its distributors and including Gravely Pacific, Inc.; that Gravely Pacific, Inc., is not an independent distributor but is a branch and division of Gravely Motor Plow and Cultivator Company; that on many occasions the said John W. Heinen as manager of Gravely Pacific, Inc., has advised affiant both in writing and orally that he would have to seek directions from the factory before he could advise affiant with respect to inquiries made to him; that said John W. Heinen exercised no independent judgment nor did he have independent discretion concerning the relations between affiant's firm and the factory and that all matters concerning the sale, distribution, servicing and displaying of Gravely products were dictated and formulated by the Gravely Motor Plow and Cultivator Company and the said Gravely Pacific, Inc., acted merely as an agent and servant of said company for the carrying out of its policies and plans.

/s/ D. E. GRAVES.

Subscribed and sworn to before me this 6th day of June, 1947.

[Seal] /s/ LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed June 9, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF PEARL G. SMITH

State of California,
County of Los Angeles—ss.

Pearl G. Smith, being first duly sworn, deposes and says:

That she was employed by Gravely Pacific, Inc., from January, 1946, to September, 1946, at its place of business in the City of Glendale, California, and that during all of said time she was in charge of the correspondence and accounting for said company and took full charge of all office matters during the absence of the manager of said company, to wit, John W. Heinen.

That affiant was familiar with all of the correspondence that passed between Gravely Pacific, Inc., and Gravely Motor Plow and Cultivator and that financial statements and auditor's reports of Gravely Pacific, Inc., were transmitted at regular intervals to D. Ray Hall, as President of Gravely Motor Plow and Cultivator Company, at Dunbar, West Virginia; and that to the best of her knowledge and belief, directions as to policy and procedure to be followed by Gravely Pacific, Inc., came from said D. Ray Hall, as President of said Company, and affiant has no recollection of ever seeing any correspondence from Edwin F. Heiner, or any

correspondence sent to him on behalf of Gravely Pacific, Inc.

/s/ PEARL G. SMITH.

Subscribed and sworn to before me this 10th day of June, 1947.

[Seal] /s/ IDA M. MURPHY,
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires May 8, 1949.

[Endorsed]: Filed June 16, 1947.

[Title of District Court and Cause.]

ORDER

Defendant Gravely Motor Plow and Cultivator Company's motion to quash service of summons and to dismiss having been briefed, argued and presented to the court for decision, and the same having been duly considered,

It Is Ordered that the motion be and the same hereby is Denied.

Dated: June 20, 1947.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed June 20, 1947.

[Title of District Court and Cause.]

SECOND AMENDED ANSWER OF
DEFENDANT

Now comes defendant Gravely Motor Plow and Cultivator Company, a corporation, and by leave of court first had and obtained, files this, its second amended answer to the complaint on file herein, and admits, denies and alleges as follows:

I.

Denies each and every allegation contained in paragraph II of said complaint, except that this defendant admits it is a corporation organized under the laws of the State of West Virginia.

II.

Admits all the allegations contained in paragraph IV of said complaint, except that this defendant denies that Gravely-Pacific, Inc. is a wholly owned subsidiary of this defendant whose officers and directors are identical or almost identical with the officers and directors of this defendant.

III.

Admits the allegations contained in paragraph VII of said complaint, except this defendant denies that said contract dated the 7th day of December, 1925, has never been cancelled by either party to it, or by plaintiff as the successor of H. V. Carter Company, and denies that ever since the date of said contract plaintiff has been and now is the dealer for all the products manufactured by this defendant for the Northern California territory; and in this

behalf alleges that the agreement dated December 7, 1925, was made and entered into by and between this defendant and H. V. Carter, an individual doing business under the firm name and style of H. V. Carter Company that H. V. Carter died on or about the 17th day of August, 1931, and that by reason of the death of H. V. Carter said contract was terminated; that said contract was never assigned or transferred to plaintiff; that this defendant never consented to any transfer of said contract from H. V. Carter Company to plaintiff, and plaintiff has no right, title or interest in or to said contract as the successor of H. V. Carter Company or otherwise; that subsequent to the death of H. V. Carter, plaintiff acted only as a non-exclusive agent in Northern California for products manufactured by this defendant, which agency was subject to termination at any time; that subsequent to the death of H. V. Carter, no agreement, written or otherwise, was entered into between this defendant and plaintiff providing for the appointment of plaintiff as the exclusive dealer in Northern California for the products manufactured by this defendant; that in the year 1935 this defendant established a distributor in certain territory, including the State of California; that said distributor was authorized, with the acquiescence of this defendant, to constitute, maintain and/or discontinue dealers in said territory; that in the year 1935 plaintiff was definitely advised by said distributor, confirmed in writing by this defendant, that plaintiff's status as a dealer for this defendant was non-exclusive; that plaintiff at that time acknowledged its status as

being that of a non-exclusive dealer; that no contention was made by plaintiff at that time, or at any time thereafter, until the institution of this action, that said contract of December 7, 1925, was still in effect; and that on or about the 23rd day of August, 1946, all arrangements for the sale by plaintiff of products manufactured by this defendant were cancelled and terminated by written notice given to plaintiff by Gravely-Pacific, Inc., as the duly authorized representative of this defendant for said purpose.

IV.

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII of said complaint, and, therefore, denies each and every allegation contained therein.

V.

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph X beginning with the word "that" in line 21, page 4, and ending with the word "Gravely" in line 1, page 5, and, therefore, denies each and every allegation therein contained. Further answering the allegations contained in said paragraph X, beginning with the word "that" in line 8, page 5, and continuing to the end of the paragraph, this defendant admits that it received and acknowledged receipt of said orders, but denies that it accepted all of said orders or any thereof, and further denies that in no way did it notify or advise plaintiff that it would not accept

said orders, or that it would not deliver said tractors to plaintiff in fulfillment of said orders at such time as it became re-engaged in the manufacture thereof, or otherwise, or at all.

VI.

Denies each and every, all and singular, the allegations contained in paragraph XI of said complaint, except that this defendant admits it has for some time manufactured tractors and other products and has supplied and delivered said tractors and other products to other dealers, jobbers, distributors and users throughout the United States, and has also supplied and distributed such products to Gravely-Pacific, Inc.

VII.

Denies each and every, all and singular, the allegations contained in paragraph XII of said complaint.

For a Further and Separate Answer to said complaint, this defendant alleges that this Court is without jurisdiction over this defendant for the reason that it is not an inhabitant of the Northern District of California, nor is this defendant doing business nor has it ever done business in the State of California, nor has it any employee, agent or representative in the State of California, nor does it have or maintain a regular and established place of business in said State of California, nor does it conduct business of any nature or description in said State, and no valid service has been made upon this defendant.

Wherefore, this defendant prays to be hence dismissed with its costs of suit.

/s/ SAMUEL S. STEVENS,
HELLER, EHRMAN, WHITE
& McAULIFFE,

Attorneys for defendant Gravely Motor Plow and
Cultivator Company.

State of California,
City and County of San Francisco—ss.

D. Ray Hall, being duly sworn, deposes and says:

That he is an officer, to wit, President, of Gravely Motor Plow and Cultivator Company, a corporation, one of the defendants named in the foregoing action, and as such is authorized to make this verification for and on behalf of said corporation; that he has read the foregoing Second Amended Answer of Defendant Gravely Motor Plow and Cultivator Company and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters he believes it to be true.

/s/ D. RAY HALL.

Subscribed and sworn to before me this 23rd day
of November, 1948.

[Seal] CATHERINE E. KEITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires December 16, 1950.

[Endorsed]: Filed November 23, 1948.

In the District Court of the United States, in and
for the Northern District of California, South-
ern Division

Case No. 27114 H

H. V. CARTER CO, INC.,

Plaintiff,

vs.

GRAVELY MOTOR PLOW AND CULTIVA-
TOR COMPANY, a Corporation, GRAVELY
MOTOR PLOW AND TRACTOR CO., INC.,
a Corporation, GRAVELY-PACIFIC, INC.,
a Corporation, FIRST DOE COMPANY,
SECOND DOE COMPANY and THIRD DOE
COMPANY, corporations,

Defendants.

DECISION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant Gravely Motor Plow and Cultivator Company, hereinafter called "Gravely," moved the Court for an order to quash the service of summons on said defendant "Gravely" and to dismiss the action as to said defendant. The motion was denied by order entered June 20, 1947.

The answer of "Gravely" filed October 8, 1947, and each of the amended answers subsequently filed, urged by way of separate defense the question of the validity of the service.

At the beginning of the trial and again at the conclusion thereof the motion to quash service of summons on "Gravely" was renewed.

Service of process upon defendant "Gravely" was attempted to be made by delivering a copy of summons and complaint to John W. Heinen, Manager of Gravely-Pacific, Inc., a corporation, hereinafter referred to as "Pacific." "Pacific" is a corporate subsidiary of "Gravely." From the affidavits in support of the motion to quash and from the evidence adduced at the trial, it appears that "Gravely" and "Pacific" are separate corporate entities, both being incorporated under the laws of West Virginia. Each corporation employs separate personnel, the books of account and other records of each corporation are separately kept at their respective offices in different cities.

D. Ray Hall is President of both corporations; V. D. Tippet is Treasurer of "Gravely"; Kenneth Thomas is Secretary of "Gravely" and Treasurer of "Pacific"; A. G. Thompson is Secretary of "Pacific" and Counsel for "Gravely"; A. D. Williams is Vice-President of "Gravely" and Sybil Hall, wife of D. Ray Hall, is Vice-President of "Pacific." "Pacific" stock is owned by "Gravely" except three "qualifying shares."

"Pacific" purchases "Gravely" products on terms of net cash in 30 days and payments for all purchases are made by "Pacific" by its checks payable to "Gravely." The facts here as to the relations between the two corporations are like those considered by the United States Supreme Court in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 45 S.Ct. 250. A case involving the same questions in regard to a subsidiary of "Gravely" was decided in

the Appellate Division, Supreme Court of New York, 69 N.Y. Supp. 175, the Court holding, under facts identical with those presented here, that the subsidiary was not an agent of the parent company. "Gravely" was not doing business in California in the sense that it was amenable to process in action in California.

It Is Ordered that defendant Gravely Motor Plow and Cultivator Company's motion for an order to quash service of summons on said defendant Gravely Motor Plow and Cultivator Company, and to dismiss the action as to said defendant, be, and the same hereby is granted, and plaintiff's complaint is hereby dismissed as to the defendant Gravely Motor Plow and Cultivator Company.

The Court, having heard the testimony and having examined the proof offered by the respective parties, and the cause having been submitted to the Court for decision, now finds the facts and states conclusions of law as follows:

Findings of Fact

1. That plaintiff H. V. Carter Co., Inc., is now, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California and authorized to do business within the State of California and having its principal place of business in the City and County of San Francisco.

2. That defendant Gravely Motor Plow and Cultivator Company is a corporation organized under the laws of the State of West Virginia and

that said defendant, hereinafter called "Gravely," is not now and has not at any of the times mentioned in plaintiff's complaint been doing business in the State of California in the sense that it would be amenable to service of process in said State.

3. That defendant Gravely-Pacific, Inc., hereinafter called "Pacific," is a corporation organized under the laws of the State of West Virginia and is now and has been, since its incorporation December 30, 1944, doing business within the State of California.

4. That all of the capital stock of "Pacific" is owned by "Gravely" except three shares, one of which is owned by D. Ray Hall, President of both corporations; one share owned by Sybil Hall, wife of said D. Ray Hall, and Vice-President of "Pacific"; and one of said three shares is owned by Kenneth Thomas, Treasurer of "Pacific" and Secretary of "Gravely"; that the officers of the two corporations are as follows:

"Gravely"

President.....	D. Ray Hall
Vice-President.....	A. D. Williams
Secretary.....	Kenneth Thomas
Treasurer.....	V. D. Tippet
Counsel.....	A. G. Thompson

"Pacific"

President.....	D. Ray Hall
Vice-President.....	Sybil Hall
Secretary.....	A. G. Thompson
Treasurer.....	Kenneth Thomas

That the auditor of "Gravely" is R. C. P. Waicher of Charleston, West Virginia; that the books and accounts and reports of "Gravely" are kept in Dunbar, West Virginia; that the auditor of "Pacific" is George Brun of Pasadena, California; that the books and records of account of "Pacific" are kept in Los Angeles, California; that the income tax returns of "Gravely" and "Pacific" are made separately.

5. That plaintiff for many years, now is, engaged in the business of distributions, sales and service of farm and garden tractors and similar kinds of supplies and equipment.

6. That on July 3, 1946, plaintiff placed an order with "Pacific" for 45 tractors (Exhibit X in evidence); that said order for 45 tractors was never acknowledged or accepted by "Pacific."

7. That the alterations and improvements made by plaintiff were permanent in nature and were being used at the time of the commencement of this action for the display of tractors and equipment other than those manufactured or sold by either of the defendants.

8. That plaintiff was not at any time an agent of "Pacific" and plaintiff was not at any time an exclusive dealer of tractors or any other equipment or supplies dealt in by "Pacific."

From the foregoing facts the Court concludes:

Conclusions of Law

1. That the defendant Gravely Motor Plow and Cultivator Company was not at any of the times

mentioned in plaintiff's complaint doing business in the State of California in the sense that said corporation would be amenable to service of process in said State.

2. That the defendant Gravely Motor Plow and Cultivator Company is entitled to judgment quashing the service of summons herein on said defendant and dismissing this action as to said defendant.

3. That defendant Gravely-Pacific, Inc., a corporation, is entitled to judgment denying the prayer of plaintiff's complaint and for costs herein incurred.

Let Judgment Be Entered Accordingly.

Dated: This 22nd day of June, A.D., 1949.

/s/ ROGER T. FOLEY,
United States District Judge.

Entered in civil docket June 24th, 1949.

[Endorsed]: Filed June 23, 1949.

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

Case No. 27114 H

H. V. CARTER CO., INC.,

Plaintiff,

vs.

GRAVELY MOTOR PLOW AND CULTIVA-
TOR COMPANY, a Corporation, GRAVELY
MOTOR PLOW AND TRACTOR CO., INC.,
a Corporation, GRAVELY-PACIFIC, INC.,
a Corporation, FIRST DOE COMPANY,
SECOND DOE COMPANY and THIRD DOE
COMPANY, corporations,

Defendants.

JUDGMENT

The above-entitled cause coming on regularly to
be heard on the 22nd day of November, 1948, and
the Court having heard the evidence therein, and
having heretofore made its findings of fact and
conclusions of law, upon the said findings and con-
clusions,

It Is Hereby Ordered, Adjudged and Decreed as
follows:

1. That service of summons herein on defendant
Gravely Motor Plow and Cultivator Company be
quashed and said action be and the same is hereby
dismissed as to said defendant Gravely Motor
Plow and Cultivator Company.

2. That plaintiff take nothing by reason of its

complaint against defendant Gravely-Pacific, Inc., and said defendant Gravely-Pacific, Inc., have judgment denying the prayer of plaintiff's complaint, and for costs of this action, and have execution therefor.

Dated at Washington, D. C., this 18th day of July, 1949.

/s/ ROGER T. FOLEY,

United States District Judge.

Approved as to form only.

CARROLL, DAVIS &

FRIEDENRICH,

Attorneys for Plaintiff.

[Endorsed]: Filed July 26, 1949.

Entered in civil docket July 27th, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR A NEW TRIAL
AND TO ALTER OR AMEND JUDGMENT

To the Honorable United States District Court for the Northern District of California, Southern Division, and to the Honorable Roger T. Foley, Judge Thereof, and to Messrs. Heller, Ehrman, White & McAuliffe, Attorneys for Defendants:

Please take notice that the plaintiff herein will move the above-entitled court to vacate and set aside the judgment of the court heretofore made and entered in favor of the defendants and against the plaintiff in the above-entitled action, and to grant the plaintiff a new trial herein and to alter

or amend the said judgment, upon the following grounds:

1. Insufficiency of the evidence to justify or support the judgment;
2. That the judgment is against the law;
3. Errors in law occurring at the time of trial and excepted to by plaintiff;
4. Irregularities and errors in the Findings of Fact and Conclusions of Law upon which said judgment is based;
5. Insufficiency of said Findings of Fact and Conclusions of Law;
6. Failure of the Court to make a determination of all of the issues presented at the trial of said cause;
7. That the granting by the Court of the motion of defendant Gravely Motor Plow and Cultivator Company for an order to quash service of summons on said defendant and to dismiss plaintiff's action as to said defendant was erroneous, not supported by the evidence, and is contrary to law.

Said motion will be made and based upon the minutes of the said Court, and upon the papers and records on file with the above-entitled Court in said cause.

Dated: August 4, 1949.

CARROLL, DAVIS &
FREIDENRICH,

Attorneys for said Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed August 5, 1949.

In the District Court of the United States, in and
for the Northern District of California, South-
ern Division

Case No. 27114 H

H. V. CARTER CO., INC.,

Plaintiff,

vs.

GRAVELY MOTOR PLOW AND CULTIVA-
TOR COMPANY, a Corporation, GRAVELY
MOTOR PLOW AND TRACTOR CO., INC.,
a Corporation, GRAVELY-PACIFIC, INC.,
a Corporation, FIRST DOE COMPANY,
SECOND DOE COMPANY and THIRD DOE
COMPANY, corporations,

Defendants.

DECISION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 4, 1949, plaintiff, H. V. Carter Co., Inc., served its "Notice of Motion for a New Trial and to Alter or Amend Judgment." The judgment referred to was entered July 26, 1949, and was in favor of defendants Gravely Motor Plow and Cultivator Company, a corporation, hereinafter called "Gravely," and Gravely-Pacific, Inc., a corporation, hereinafter called "Pacific."

At an early stage of the proceedings, defendant "Gravely" moved for an order to quash the service of summons and to dismiss the action as to said defendant "Gravely." The order of Judge Harris denying said motion was entered June 20, 1947. The

answer of "Gravely," filed October 8, 1947, and each of the amended answers subsequently filed, urged by way of separate defense the question of the validity of the service upon "Gravely" and the jurisdiction of the Court of the person of "Gravely." At the beginning of the trial and again at the conclusion thereof, the motion to quash service of summons was renewed.

The case was tried and briefed upon the theory that the question of the jurisdiction of the person of "Gravely" was properly before the Trial Judge. The propriety of reviewing the decision of Judge Harris was not raised by counsel for any of the parties.

Upon the hearing of the Motion for a new trial and to alter or amend Judgment, the Court suggested to counsel the possibility that Judge Harris' prior ruling on the motion to quash service had become the "law of the case."

The power to review the order of Judge Harris was not within the province of the Trial Judge, no question as to jurisdiction of the subject matter being involved. *Commercial Union of America v. Anglo-South American Bank*, 10 F.2d 937; *Oglesby v. Attrill*, 14 F. 214. The Trial Judge, while holding to the opinion that the Court has no jurisdiction of the person of "Gravely," abdicates in deference to the views of Judge Harris.

From a review of the record in considering plaintiff's "Motion for a New Trial and to Alter or Amend Judgment," it appears that a judgment against "Gravely" on the merits ought to be rend-

ered upon the present state of the record. The case was well and fully tried. It is likely that counsel would agree that no additional evidence could be procured. It seems that nothing would be accomplished by a new trial.

Rule 59, Federal Rules of Civil Procedure, provides that: "On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." Under Rules 52(b) and 59(a), findings may be amended and a judgment may be entered against "Gravely."

This Court does not entirely agree with the views of Judge Yankwich expressed on this subject in *Brooks Bros. v. Brooks Clothing of California*, 5 F.D.R. 14. However, there is a distinction here. There has been no judgment entered in this case to this time against "Gravely" on the merits.

The record here indicates that during the years plaintiff performed services for the defendant "Gravely," a continuing dealer relationship existed either by express contract or by the conduct of the parties throughout the terms of and after the expiration of the written contracts. These services were beneficial to the interests of "Gravely" and the parties understood that said services were to be paid for. Throughout the years, plaintiff served said defendant as a sales agent and advanced the interests of the defendant and publicized the merits of its product, serviced its machines, instructed "ul-

ultimate purchasers'' in the use of same, and performed other services. Such services were not gratuitous and were worthy of compensation. The discount system shown by the record was a method of determining and making that compensation. The orders for 122 tractors, the subject matter of this action, were the result of solicitation by the plaintiff with the knowledge, consent and at the request of the defendant. Plaintiff at all times was ready, willing and able to pay the manufacturer's "list price" of each of the tractors ordered at the time or before delivery was to be made. If defendant decided to refuse these orders it was within its right in such refusal, but defendant must compensate plaintiff for services rendered and an accurate and fair measure of that compensation is on the basis of the "discount." *Taylor Manuf'g Co. v. Hatcher Manuf'g Co.*, 39 F. 440; *Gantner & Mattern Co. v. Hawkins*, 201 P.2d 847, holding that "a principal cannot deprive his agent of commissions on goods ordered through agent by discharging him before the orders are filled."

Restrictions in manufacture and distribution of products brought about by World War II was "Gravely's" often expressed excuse for not making reasonable deliveries. During the war years plaintiff had been urged to continue its services and particularly to continue its solicitation for ultimate purchasers and orders. The record here discloses that after the abating and lifting of war restrictions, "Gravely" increased production and manufacture and instead of respecting its obligations

with plaintiff, forwarded to its subsidiary "Pacific" more than 122 tractors. The record discloses various excuses for "Gravely's" failure to make deliveries to plaintiff including claimed failure on the part of the plaintiff to comply with newly made regulations by "Gravely," but circumstances appear in the record which may also be considered as a motive for this failure of delivery. "Pacific" was to receive a discount of 40%. All the capital stock of "Pacific" is owned by "Gravely" except three shares. These circumstances may or may not have influenced "Gravely's" determination to refuse delivery.

The Court, having examined the proofs offered by the respective parties, now finds the facts and states conclusions of law as follows:

Findings of Fact

1. That plaintiff is now, and since 1936 has been, a corporation organized under the laws of the State of California.

2. That defendant Gravely Motor Plow and Cultivator Company, hereinafter called "Gravely," is now, and at all times hereinafter mentioned has been, a corporation organized under the laws of the State of West Virginia.

3. That a dismissal has been entered as to defendant Gravely Motor Plow and Tractor Co., Inc.

4. That Gravely-Pacific, Inc., hereinafter called "Pacific," is now, and since on or about December 30, 1944, has been, a corporation under the laws of the State of West Virginia, doing business in the State of California.

5. That all the capital stock of "Pacific" is owned by "Gravely" except three shares, one of which is owned by D. Ray Hall, President of both corporations; one share owned by Sybil Hall, wife of said D. Ray Hall, and Vice-President of "Pacific"; and one of said three shares is owned by Kenneth Thomas, Treasurer of "Pacific" and Secretary of "Gravely"; that the officers of the two corporations are as follows:

"Gravely"—

President	D. Ray Hall
Vice-President	A. D. Williams
Secretary	Kenneth Thomas
Treasurer	V. D. Tippet
Counsel	A. G. Thompson

"Pacific"—

President	D. Ray Hall
Vice-President	Sybil Hall
Secretary	A. G. Thompson
Treasurer	Kenneth Thomas

That the auditor of "Gravely" is R. C. P. Waicher of Charleston, West Virginia; that the books and accounts and reports of "Gravely" are kept in Dunbar, West Virginia; that the auditor of "Pacific" is George Brun of Pasadena, California; that the books and accounts of "Pacific" are kept in Los Angeles, California; that the income tax returns of "Gravely" and "Pacific" are made separately.

6. That plaintiff for many years has been and now is engaged in the business of distribution, sales and service of farm and garden tractors and similar kinds of supplies and equipment.

7. That the alterations and improvements made by plaintiff in its business establishment in San Francisco were permanent in nature and were being used at the time of the commencement of this action for the distribution, sales, service and display of tractors, supplies and equipment other than those manufactured or sold by either of the defendants.

8. That plaintiff was not at any time a dealer or agent of "Pacific."

9. That the exclusive agency created by the contract of December 7, 1925 (Exhibit I), ceased to exist after January 14, 1935, and that thereafter and until the contract of November 7, 1940 (Exhibit P), was entered into, the plaintiff was not an exclusive dealer in the products of "Gravely."

10. That the contract of November 7, 1940 (Exhibit P), expired January 1, 1942, and from January 1, 1942, no exclusive dealership relation existed between plaintiff and "Gravely."

11. That at all of the times the orders for 122 tractors, the subject matter of this action, were forwarded to "Gravely," the plaintiff was a non-exclusive dealer in "Gravely" products and continued as such dealer until August 23, 1946.

12. That the said orders for 122 tractors were

placed by plaintiff with defendant "Gravely" between the beginning of World War II and August 23, 1946.

13. That the said orders for 122 tractors were accepted by "Gravely" with the qualifications that deliveries would be made as soon as conditions created by the War would permit.

14. That plaintiff during all of the time it was a dealer of "Gravely" products, including the period during which the said orders for 122 tractors were placed with "Gravely," performed services for "Gravely" as such dealer at its request as follows: Advertised "Gravely" products; solicited and made sales of "Gravely" products; serviced machines and carried repair parts; maintained service shop; employed salesmen and servicemen; followed up prospect lists and leads sent by "Gravely"; made demonstrations of "Gravely" products to prospective purchasers; assembled and serviced new machines sent by "Gravely"; transported machines to destination and instructed purchasers in the operation of machines and exhibited "Gravely" products at various fairs and floral shows including the State Fair at Sacramento, California; and other similar services.

15. That all of said orders for 122 tractors were for "ultimate purchasers," persons who had agreed to purchase the tractors from the plaintiff.

16. That after restrictions occasioned by the War were alleviated or removed, "Gravely," in the years

1945, 1946 and 1947, shipped to "Pacific," its California distributor, more than 122 tractors.

17. That "Gravely" failed and refused, and continues in such failure and refusal, to make deliveries to plaintiff of any of the said 122 tractors ordered by plaintiff.

18. That all the said orders for 122 tractors were orders placed with plaintiff by "ultimate purchasers" and forwarded by plaintiff to defendant "Gravely."

19. That plaintiff was at all times, since the placing of said orders, ready, able and willing to pay defendant "Gravely" its "list price" for each of the 122 tractors ordered; and that said "list price" for each of said tractors was at least \$300.00.

20. That by custom and agreement of many years' standing and existing at the time of forwarding said orders for 122 tractors by plaintiff to defendant "Gravely," plaintiff was to be compensated for the services described above in Finding No. 14 in the form of and by means of a discount of 30% from defendant's "list price," said list price to be paid by plaintiff to defendant "Gravely" before delivery.

From the foregoing facts the Court concludes:

Conclusions of Law

1. That plaintiff is entitled to recover from defendant Gravely Motor Plow and Cultivator Company, a corporation, for each of said 122 tractors

ordered by plaintiff, 30% of \$300.00, or the sum of \$10,980.00, and its costs.

2. That plaintiff take nothing from Gravely-Pacific, Inc., a corporation.

Let Judgment Be Entered Accordingly.

Dated: This 10th day of March, A.D., 1950.

/s/ ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed March 11, 1950.

In the District Court of the United States In and
for the Northern District of California, South-
ern Division

No. 27114 H

H. V. CARTER CO., INC.,

Plaintiff,

vs.

GRAVELY MOTOR PLOW AND CULTIVA-
TOR COMPANY, a Corporation, GRAVELY
MOTOR PLOW AND TRACTOR CO., INC.,
a Corporation, GRAVELY-PACIFIC INC., a
Corporation, FIRST DOE COMPANY, SEC-
OND DOE COMPANY and THIRD DOE
COMPANY, Corporations,

Defendants.

JUDGMENT

The above-entitled cause coming on regularly to
be heard on the 22nd day of November, 1948, and

the court having heard the evidence herein and having heretofore made its findings of fact and conclusions of law, upon the said findings and conclusions,

It Is Hereby Ordered, Adjudged and Decreed as Follows:

(1) That plaintiff have and is hereby awarded judgment against defendant Gravely Motor Plow and Cultivator Company, a corporation, in the sum of Ten Thousand Nine Hundred Eighty Dollars (\$10,980.00), with interest thereon at the rate of seven per cent (7%) per annum from the date of entry of this judgment, and for its costs of suit, and have execution therefor.

(2) That plaintiff take nothing from defendant Gravely-Pacific, Inc., a corporation, and that said defendant have and recover its costs of suit from plaintiff herein.

Dated at Reno, Nevada, this 20th day of March, 1950.

/s/ ROGER T. FOLEY,

United States District Judge.

Approved as to form:

/s/ SAMUEL S. STEVENS.

HELLER, EHRMAN, WHITE &
McAULIFFE.

Attorneys for Defendants.

Entered in Civil Docket March 21, 1950.

[Endorsed]: Filed March 21, 1950.

[Title of District Court and Cause.]

NOTICE OF MOTION TO ALTER, AMEND
AND MAKE ADDITIONAL FINDINGS OF
FACT AND CONCLUSIONS OF LAW AND
TO AMEND JUDGMENT ACCORDINGLY

To the Honorable United States District Court for
the Northern District of California, Southern
Division, and to the Honorable Roger T. Foley,
Judge Thereof, and to H. V. Carter Co., Inc.,
Plaintiff and Messrs. Carrol, Davis & Freiden-
rich, Its Attorneys:

Please take notice that defendants herein will
move the above-entitled court to vacate and set aside
the judgment of the court heretofore made and en-
tered in favor of the plaintiff and against defendant
Gravely Motor Plow and Cultivator Company in the
above-entitled action, and to alter, amend and make
additional findings of fact and conclusions of law
and to amend said judgment accordingly, upon the
following grounds:

I.

The judgment is contrary to and unsupported by
the evidence.

II.

The judgment is contrary to and unsupported
by law.

III.

The judgment is contrary to the law and evidence,
and judgment should have been rendered in favor
of defendants.

IV.

Irregularities, omissions, errors and inconsistencies in the findings of fact and conclusions of law upon which said judgment is based.

V.

Insufficiency of the findings of fact and conclusions of law to support the judgment.

Said motion will be made and based upon the minutes of said court, and upon the papers and records on file with the above-entitled court in said cause.

Dated: March 30, 1950.

/s/ SAMUEL S. STEVENS,
HELLER, EHRMAN, WHITE &
McAULIFFE,
Attorneys for Defendants.

[Endorsed]: Filed March 30, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL
TO COURT OF APPEALS

Notice is hereby given that Gravely Motor Plow and Cultivator Company, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 21st day of March, 1950.

/s/ SAMUEL S. STEVENS,
HELLER, EHRMAN, WHITE &
McAULIFFE,

Attorneys for Appellant, Gravely Motor Plow and Cultivator Company, a Corporation.

[Endorsed]: Filed November 14, 1950.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, Gravely Motor Plow and Cultivator Company, a Corporation, Defendant herein, have prosecuted or are about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment made and entered March 21, 1950, by the District Court of the United States for the Northern District of California, Southern Division.

Now, Therefore, in consideration of the premises, the undersigned, Fidelity and Deposit Company of Maryland, a corporation duly organized and exist-

ing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of Gravely Motor Plow and Cultivator Company, a Corporation, Appellant, that they will prosecute their appeal to effect and answer all costs if they fail to make good their appeal, not exceeding the sum of Two Hundred Fifty and No/100 Dollars (\$250.00), to which amount said Fidelity and Deposit Company of Maryland acknowledges itself justly bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefore against it and award execution therefor.

Signed, Seal and Dated this 13th day of November, 1950.

[Seal]

FIDELITY AND DEPOSIT

COMPANY OF MARYLAND,

By /s/ CARL H. KUHN,

Attorney in Fact.

Attest:

/s/ S. CLIMO,

Attesting Agent.

State of California

City and County of San Francisco—ss.

On this 13th day of November, A.D. 1950, before me, Belle Jordan, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Carl H. Kuhn, Attorney-in-Fact, and S. Climo, Agent, of the Fidelity and Deposit Company of Maryland, a corporation known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the Attorney-in-Fact and Agent respectively of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-Fact and Agent respectively.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

/s/ BELLE JORDAN,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires Nov. 9, 1952.

[Endorsed]: Filed November 14, 1950.

[Title of District Court and Cause.]

ORDER ON MOTION OF DEFENDANTS TO
ALTER, AMEND AND MAKE ADDI-
TIONAL FINDINGS OF FACT AND CON-
CLUSIONS OF LAW AND TO AMEND
JUDGMENT ACCORDINGLY

Defendants' motion to vacate and set aside the Judgment of the Court heretofore made and entered in favor of plaintiff and against defendant Gravely Motor Plow and Cultivator Company in the above-entitled action, and to alter, amend and make additional findings of fact and conclusions of law, and to amend said Judgment accordingly, having been submitted by the parties and considered by the Court.

It Is Hereby Ordered that said motion be, and the same hereby is, denied in its entirety.

Dated: This 16th day of October, A.D., 1950.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed October 18, 1950.

[Title of District Court and Cause.]

ORDER ON PLAINTIFF'S MOTION TO
AMEND THE FINDINGS OF FACT BY
MAKING AN ADDITIONAL FINDING OF
FACT

Plaintiff's motion to amend findings of fact heretofore made in the above-entitled action on the 10th

day of March, 1950, by making an additional finding of fact as follows, to-wit:

“That defendant ‘Gravely’ was at the time of the commencement of this action and the issuance of process therein and had been prior thereto doing business within the state of California.”

having been submitted by the parties and considered by the Court,

It Is Hereby Ordered that said motion be, and the same hereby is, denied.

Dated: This 16th day of October, A.D., 1950.

/s/ ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed October 18, 1950.

In the Southern Division of the United States District Court for the Northern District of California

No. 27,114

H. V. CARTER COMPANY,

Plaintiff,

vs.

GRAVELY MOTOR PLOW & CULTIVATOR COMPANY,

Defendant.

Before: Hon. George B. Harris, Judge.

REPORTER'S TRANSCRIPT
HEARING ON MOTION TO QUASH

Monday, June 9, 1947

The Clerk: H. V. Carter vs. Gravelly Motor Plow & Cultivator Company.

The Court: Do you have a witness?

Mr. Freidenrich: Yes. I also ask leave to file a Supplemental Answer.

The Court: You have certain motions, Counsel?

Mr. Freidenrich: Yes. I will file it after. I will call Mr. Graves. [1*]

DAVID E. GRAVES

called as a witness by the plaintiff; sworn.

The Court: This witness is being offered on the motion to quash?

Mr. Freidenrich: Yes, your Honor.

* Page numbering stamped at top of page of original Reporter's Transcript.

(Testimony of David E. Graves.)

Direct Examination

By Mr. Freidenrich:

Q. Mr. Graves, you are the president of H. V. Carter Company, a corporation? A. I am.

Q. Which is the plaintiff in this case?

A. Correct.

Q. Are you the general manager of the plaintiff company, as well as its president? A. I am.

Q. Do you see all correspondence coming in to the company from manufacturers and the people whom the company does business with?

A. Except when I am away from the office.

Q. Except when you are away from the office?

A. Yes.

Mr. Freidenrich: I wonder if counsel would stand up here with me, because I have a batch of correspondence that I would like to introduce for identification.

Q. I will show you a document and ask you if you have seen that before. A. I have. [2]

Q. Did that come from your files?

A. It did.

Q. You gave that to me from your correspondence files? A. I did.

Q. I show you the back, here, and refer you to a stamp and ask you if that is your stamp?

A. I received it and initialed it.

Q. That is your stamp showing the date you received it, and you put your initials on it?

A. That is correct.

(Testimony of David E. Graves.)

Q. This is entitled, "Gravely Bulletin"?

A. It is.

Q. Where did you receive this from?

A. Dunbar, West Virginia.

Q. From the Gravely Motor Plow & Cultivator Company?

A. It came in their envelope.

Q. Is it their practice to send bulletins from time to time?

A. That is typical of the bulletins we always receive.

Q. And their policy?

A. That is correct.

Mr. Freidenrich: I would like to offer this in evidence.

The Court: It may be received.

Mr. Clifford: No objection.

(The bulletin to which reference last was made was [3] marked Plaintiff's Exhibit 1.)

Q. (By Mr. Freidenrich): I show you another document and ask you if you have seen that before.

A. I have.

Q. Is that also a Gravely Bulletin that you received in the mail from the Gravely Company at Dunbar, West Virginia?

A. Correct.

Q. Is this your receivable stamp and your initials?

A. Yes.

Q. Attached to it is a carbon copy of a letter that you wrote?

A. Correct.

Q. To Mr. Hall, of the Gravely Company?

(Testimony of David E. Graves.)

A. Yes.

Q. On your carbon copy is typewritten in green ink something. Can you explain that?

A. It is customary when we receive a letter treating on several different subjects to make an extract from that letter to either type it on the copy of the letter to which it refers, or to make an extract on another piece of paper and attach it to the company. In this instance this extract from the letter of the Gravely Motor Plow & Cultivator Company was typed on there, and I did it, myself.

Q. When did you do that?

A. I couldn't tell you the exact date, but this letter was [4] received by me on August 7th, and it is customary to——

The Court: August 7th; what year?

A. 1945. Note that this bulletin was received with—it refers to this letter—this letter refers to that, and this one is on August 17 that I wrote this on there, an abstract from their letter of August 10th, 1945, received by us on August 17, 1945.

Q. (By Mr. Freidenrich): Well, the point is you wrote this on there at or about the time you wrote this letter of which this is a copy, carbon copy to the company? A. Yes.

Mr. Freidenrich: We would like to offer this in evidence, if your Honor please.

The Court: It may be received and appropriately marked.

The Clerk: For the sake of the record, the other one was Plaintiff's 1; this is Plaintiff's Exhibit 2.

(Testimony of David E. Graves.)

Mr. Freidenrich: Yes.

The Court: I would suggest, in the interest of time, that counsel have an opportunity to examine them first.

Mr. Freidenrich: That is what he is doing.

The Court: And to offer them as one exhibit and have them identified as such.

Mr. Freidenrich: While counsel is doing that, your Honor, I would like to take a moment to read one paragraph from this exhibit that I introduced. This is the Bulletin exhibit. It [5] is not dated, but the date of the receivable stamp on it was August 7, 1945.

“To All Agents:

“Bulletin No. 30. Subject: This letter will be quite brief considering the importance of the subject mentioned herein. You doubtless are aware of our plan for dividing the U. S. into sections and to establish a branch in each of these sections. You are in the section to be handled through the following branch: Gravely Pacific, Inc., 4346 Colfax Avenue, North Hollywood, California.”

Q. Mr. Carter, I show you a batch of correspondence and will ask you if you will identify those and state whether or not those came from your files. A. Yes.

Q. Do they constitute the correspondence from Gravely Motor Plow & Cultivator Company, or Gravely Pacific, Inc., to H. V. Carter Company, or Bulletins from Gravely Motor Plow & Cultivator

(Testimony of David E. Graves.)

Company, and carbon copies of your replies to the respective companies? A. That is the case.

Q. Do they include anything else that you recall that I did not recall?

A. Price lists in there.

Q. Price lists attached to their letters which set out price lists, things of that nature, but they are all communications from those companies to H. V. Carter? [6] A. Correct.

Q. You recognize, of course, the signatures on these letters to you? A. I do.

Mr. Freidenrich: We would like to offer these in evidence as a group.

The Court: They may be received and marked as one exhibit.

(The documents last referred to were marked Plaintiff's Exhibit 3.)

The Court: No objection to these, Counsel?

Mr. Clifford: No objection.

Mr. Freidenrich: I think that is all, your Honor. I would like to say I neglected to have an affidavit from a witness who is out of town, that is not in, but it has been promised to us, so if I could have about two or three days——

The Court: The matter will stand submitted, then, when, as and if that affidavit is received.

The Clerk: Make it one week.

Mr. Freidenrich: The matter will go over one week?

The Clerk: Until next Monday for submission.

(Testimony of David E. Graves.)

Mr. Clifford: At that time may I make any remarks as to the correspondence that was submitted today that I wish?

The Court: You may. Do you have any additional comment to make at this time, gentlemen?

Mr. Freidenrich: Not with respect to the law, your Honor. [7] I think the law is clear. I think each case has to be determined by its own set of facts, and I don't have any further authorities to submit, but I do think the evidence submitted is conclusive to show the Gravely Pacific, Inc., is in fact a branch and a part of Gravely Motor Plow & Cultivator Company, and they are not separate and distinct, except in a corporate sense.

Mr. Clifford: I will reply to that when he has concluded his case.

The Court: One week, gentlemen.

[Endorsed]: Filed January 27, 1951.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Monday, November 22, 1948, 2:00 P.M.

Appearances:

For Plaintiff:

FRANCIS CARROLL, ESQ. and
DAVID FREIDENRICH, ESQ.

For Defendants:

F. WHITNEY TENNEY, ESQ. and
EUGENE S. CLIFFORD, ESQ.

(Following opening remarks by counsel, the following testimony was taken:)

DAVID E. GRAVES

called as a witness on behalf of plaintiff; sworn.

The Clerk: Will you state your name to the court?

A. David E. Graves.

Direct Examination

By Mr. Carroll:

Q. Mr. Graves, where do you reside, please?

A. Alameda, California.

Q. Will you tell the court, please, what your connection is with the H. V. Carter Co., Inc., the plaintiff in this action?

A. President and general manager.

(Testimony of David E. Graves.)

Q. I believe you have been resident and general manager since the incorporation of this company?

A. I have.

Q. And it was incorporated, I believe, in 1936, is that correct?

A. Correct.

Q. Was there a predecessor company of the corporation?

A. There was H. V. Carter Company.

Q. That was an unincorporated business, was it not?

A. It was.

Q. Will you tell the court what, if any, was your position with the H. V. Carter Co.?

A. I was sales manager for the company from 1917 to approximately [2*] 1922, when I became manager.

Q. And you were manager of that company from 1922 until the incorporation in 1936, is that correct?

A. That's correct.

Q. Will you tell the court, please, Mr. Graves, whether the H. V. Carter Co. is a representative of the Gravely Motor, Plow & Cultivator Company in California?

A. It was.

Q. And the Gravely Motor Plow & Cultivator Company that is sometimes called the Gravely Company is a company which manufactures farm equipment, is that correct?

A. Garden tractors.

Q. What is the general nature of your business, please?

A. The distribution, sales and service of equipment of that nature.

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of David E. Graves.)

Q. Did the Carter Company, the unincorporated company, and the H. V. Carter Co., Inc., the present plaintiff, represent the Gravely Motor Plow & Cultivator Company? A. They did.

Q. Can you tell the court, please, when that relationship began?

A. It began prior to 1925. [3]

* * *

Q. Now, Mr. Graves, what territory did you cover—and when I say you, I mean your company—for the Gravely Company?

A. The northern part of California.

Q. Can you tell us what your obligations were as agent? What did the company do for the Gravely Company in this area?

A. Follow the normal course of procedure in merchandising, which was advertising, sales work, financing, servicing, and carrying necessary repair parts, maintaining of service shop, and salesmen, as well as service men, and also demonstrators, and apparatus for taking machines about.

Q. Did you handle complaints for the Gravely Company in West Virginia from users out here that might be forwarded to the [5] Gravely Company in West Virginia?

A. If there were any, yes, sir.

Q. And did you, during this period of time, handle such complaints?

A. Well, I would say so.

Q. Did you have any duties or obligations in regard to prospect lists sent to you by the Gravely Company in West Virginia?

(Testimony of David E. Graves.)

A. Yes, of course, it was our obligation to follow them up and reply to them, and have them called on by our salesmen, and give them demonstrations as conditions warranted.

Q. Over the period of years, did they send you a large number of prospect lists?

A. Yes, they did.

Q. I hand you here, Mr. Graves, some sizable list of sheets of paper entitled, "Valuable sales leads," and I think all of these bear on the back of them the Carter Company name, and date—they seem to be in April and May of 1942. Will you tell us if these are typical of the prospect lists sent to you by the Gravely Company?

A. Yes, these are typical. However, in some cases they send us the original correspondence and then with the notations, "Referred to us," and sometimes a notation as to following them up.

Q. You received these during the course of years, did you? A. Yes, sir. [6]

Q. I notice each one of these—one is three names, two names, one name, one name; but at all events that was part of the duties of the Carter Company, was it? A. Yes, sir.

Q. Were you required to maintain any repair facilities? A. Yes, we were.

Q. Did you service these tractors throughout Northern California when they needed it?

A. Yes, sir, we did.

Q. How about parts? Where were parts maintained in California for these tractors?

(Testimony of David E. Graves.)

A. 52 Beale Street, which is our principal place of business.

Q. You were required to maintain those parts and stock?

A. It was a natural procedure in business and the factory expected us to do it.

Q. Did you have any duties in connection with the new machines when they were sent to the ultimate purchasers on farms or gardens, wherever they might be?

A. We saw first that they were properly assembled and serviced regularly until wartime, when we couldn't do it because of lack of gasoline and rubber tires. So we took the machines to destinations and delivered them and instructed the owner in the operation of them.

Q. Did you ever exhibit the Gravely tractor in California? A. Meaning what?

Q. Well, did you show it in fairs or anything of that sort? [7]

A. Oh, yes, various fairs, floral shows—always at the State Fair at Sacramento.

Q. By the way, this is not a large tractor, is it?

A. No, sir.

Q. Would you give us its approximate selling price at the present time?

A. I am not familiar with the current price, but a combination outfit—I think the factory list price was a little less than \$300, plus the attachments. I would say \$285 or ninety dollars, list price, factory.

Q. You told us this representation started about

(Testimony of David E. Graves.)

1925—oh, by the way, another thing I wanted to bring out: What was the machinery you were ordering these tractors, or by which you were ordering these tractors from the Gravely Company—what did you do?

A. We have a regular purchase order form, of which we keep one copy—two copies in reality, one in a purchase order binder; another going into our purchase order file; the original or white company going to the Gravely Company.

Q. Who was the purchaser of the product from the Gravely Company?

A. We purchased the machines.

Q. In other words, the transaction is not directly between the ultimate man on the farm and the Gravely Company; you place the order, is that right, and purchase it? [8]

A. That was the regular procedure.

Q. Tell the court how you paid for those.

A. They were paid by what is commonly called sight draft against bill of lading. We paid for them when the draft attached to the bill of lading was presented to us through the bank.

Q. And they drew against you, as I understand it, as soon as the material was put on board back there in West Virginia?

A. That would be the procedure.

Q. Did you give the Gravely Company the name of the person to whom you intended to make the sale?

A. We wrote them the name on the purchase

(Testimony of David E. Graves.)

order at the time the purchase order was made out.

Q. Was that by requirement of your principal, the Gravely Company? A. It was.

Q. Now, I hand you here what purports to be a carbon copy of a purchase order dated April 20, 1945, directed to Gravely Company, at Dunbar, West Virginia, and I ask you if that is the same type of order that you have just been testifying about? A. That is a typical order.

Q. I hand you here a post card addressed to H. V. Carter Company, Inc., signed by Gravely Motor Plow & Cultivator Company, and ask you if that is an acknowledgment of that and some other orders.

A. That is an acknowledgment of this particular order and [9] those others whose names are mentioned on there.

* * *

Q. Your compensation for this representation came in what form?

A. A discount or commission deducted from the invoice. [10]

Q. You were not paid in any other manner for the services you performed, is that correct?

A. That's correct.

Q. Directing your attention to the war years, beginning 1942, '43, '44 and '45, was there any change in the services which you rendered to your principal, the Gravely Company, during those war years—directing your attention for the moment

(Testimony of David E. Graves.)

to matters apart from actual selling or merchandising of the machine?

A. Of course, the demands on service and rebuilding machines for the owners, putting them in operating condition, was more acute during the war period than prior to wartime, because of the inability to get new equipment, and our service demands were greater; but of course, the urge was to keep the customers or the prospects, keep the customers satisfied by doing all the service work we could for them, and keeping the prospects in line and available to the Gravely equipment, so when the time of delivery came they would be sure to accept their order.

The Court: You mean by service, repairs and servicing parts? A. Yes, your Honor.

Q. (By Mr. Carroll): Did you receive any instructions from the Gravely Company along those lines during the early war years?

A. About the service?

Q. Yes, about your general relationship with the people who [11] owned this Gravely equipment.

A. Well, of course, there were numerous bulletins that came through regarding the service work to be done, to maintain our relationship as Gravely distributors favorable with the prospects and favorable with the owners.

Q. I haven't asked you this before, but did Gravely advertise directly in this general area?

A. They used magazines of general circulation

(Testimony of David E. Graves.)

and they had quite a comprehensive and elaborate, I would say, method of circularizing prospects.

Q. Do you know whether that advertising on behalf of defendant Gravely Company was discontinued during the war?

A. I think not. Well, I am quite sure it was not, because I wrote them at one time asking why, if tractors were not available, they continued such expensive advertising, and they replied it was very important to advertise in order to keep the Gravely name before the public.

Q. It was more difficult to secure tractors from the Gravely people, was it? A. Sir?

Q. It was more difficult to secure tractors from the Gravely people? A. It was.

Q. Were you ever told to discontinue selling during the war?

A. Not to my knowledge. [12]

Q. Did they discontinue sending you prospect lists during the war? A. They did not.

Q. Did they give you any instructions with regard to selling the Gravely tractors during the war?

A. Well, there was a continual urge by letters and bulletins to make our best efforts to sell tractors and to sell for the future. I remember that was quite an appropriate slogan, "Sell for the future."

Q. Did you take orders in 1943, '44 and '45 and '46 for Gravely tractors? A. We did.

Q. Did you order those tractors, yourself, in

(Testimony of David E. Graves.)

turn from the Gravely Company? A. We did.

Q. Is that by the same form you ordered them in the years before the war?

A. That's correct.

Q. It has been stipulated here between counsel and myself, Mr. Graves, that the number you ordered within the two and a half years prior to the filing of this complaint was approximately 122, is that correct, to the best of your knowledge?

A. To the best of my knowledge.

Mr. Tenney: Pardon me, Counsel, I don't believe it was the stipulation. It was an admission we were making in the [13] answer at the time we were discussing the answer, but that is unimportant.

The Court: It amounts to the same thing.

Mr. Tenney: Yes, we admit the order had been placed.

Q. (By Mr. Carroll): And that included the order for the carload of tractors according to the complaint on July 3, 1946, is that correct?

A. It is.

Q. What were you told in regard to delivery on those orders as you placed them? Let me bring out one other fact, first—these orders were not placed all at once? A. No, they were not.

Q. You sent them in from time to time?

A. That's correct.

Q. And the order you placed was an order for the delivery of the tractors to yourself, is that correct? A. Correct.

(Testimony of David E. Graves.)

Q. What were you told by the Gravely people in regard to any delivery of those orders?

Mr. Tenney: Is this orally or in writing?

Mr. Carroll: Either way, counsel.

The Witness: Well, the replies were hardly ever encouraging as to immediate delivery, and almost always as to sometime in the future. There were acknowledgments that came through, or, rather, copies of letters to the customers in [14] which they suggested possibly 90 days.

* * *

Q. (By Mr. Carroll): I notice on this Plaintiff's Exhibit No. 2 that the card signed by the Gravely Motor Plow & Cultivator Company says, "Our formal acknowledgment has been sent to the new buyers you report to us who are——" Is that the letter to the buyer you refer to? A. It is.

Q. Did you receive an acknowledgment of this sort in the form of a card in regard to the 122 orders, including the carload order of 45? Did you receive an acknowledgment from the Gravely Motor Plow & Cultivator Company as to those orders?

A. It is a broad question, but if it has to be "Yes" or "No" I would say yes.

Q. Let me ask you this: Did you receive this form of acknowledgment which appears on this order dated 4/20/45 as to these orders?

Mr. Tenney: As to what orders, the 122? [15]

Mr. Carroll: Yes.

Mr. Tenney: All of them?

Mr. Carroll: Yes.

(Testimony of David E. Graves.)

The Witness: May I qualify that just a little?

Mr. Carroll: You can answer it any way you want, Mr. Graves.

A. That postcard is a notation to us that they had received that order and had acknowledged that order to the buyer whose name we gave on our order, and I would say that being the general practice that there should have been a card received for each order we sent. I may go a little farther than that——

Q. Yes.

A. You will notice that post card stipulates three orders we sent in, so that would appear on one of our purchase order blanks. We couldn't have one for all three.

Q. I take it the point you make is that this acknowledgment, here, is attached to an order which refers to only one ultimate buyer, whereas the card acknowledges orders as to several ultimate buyers.

A. That is correct.

Q. Now, will you tell his Honor, please, whether in the years from 1925 up to the year 1943 this was the same form of acknowledgment of your orders which you received?

A. To the best of my knowledge.

Q. Did you ever, during that period of time, from 1925 up to [16] 1943, '44 or '45, or during those years, receive any different form of acknowledgment of your orders?

A. As I said previously, occasionally we would

(Testimony of David E. Graves.)

receive a copy of the letter to the customer whose name we put on the order we sent to Gravely.

Q. Is it fair to state that the acknowledgment you received of the orders which you place, and I am referring now to this 122 orders, is that the same acknowledgment that you had received in all the preceding years from this company?

A. I believe so.

Q. Now, in regard to these particular orders for these 122 tractors, did the company tell you they would not accept any one of those orders?

A. Not to my knowledge.

Q. Did they tell you they would not ship any one of those orders? A. Not to my knowledge.

Q. Did they tell you that any of those orders had been canceled?

A. I do not think they did.

Q. Did you receive any treatment from the date of these orders that was any different from the treatment in the orders which you had sent to them in all the preceding years?

A. Well, yes, because there were different requirements in connection with orders. Some orders were agricultural orders. [17] some orders were industrial orders. Some orders were War Production Board orders, and those individual types of orders had to receive different treatment.

Q. Did you ever receive from this company these particular 122 machines which you ordered from them?

A. That group of sales orders was scrutinized

(Testimony of David E. Graves.)

very, very carefully, which we tabulated, and unless there was an error or oversight there are no orders tabulated there that we had received. [18]

* * *

Q. What was your commission on these orders?

A. 30 per cent.

Q. I asked you during the recess if you could compute for me what 30 per cent would be on a total of 122 of these Gravely tractors at the list price of \$350. Did you make that computation? At least, I saw you writing on a piece of paper out there.

A. Yes, I estimated that would be in the neighborhood of \$13,000.

Q. Do you have the exact figures there?

A. I took the basis of \$350, which I thought was a fair average. That, according to my calculation, should be \$42,700; or, on a 30 per cent basis, \$12,810. [19]

* * *

Q. When did you first hear of the Gravely Pacific Company, who is the co-defendant in this case?

A. Well, Mr. Hall wrote to us in the latter part of 1944 and first part of 1945, saying that he planned to come out here and establish a branch office in Southern California, and I believe it was the first part of 1945 he wrote saying he was anticipating making reservations so he could get here later in the year.

Q. And was a branch office set up in Southern California?

A. Mr. Hall phoned me in the matter, somewhere, I think it was July of 1945, saying he was in Los Angeles and would like to come up and talk

(Testimony of David E. Graves.)

with me about the overall program, and he had hoped to get up here, and if he couldn't get up here, could I go down there? I tried to get train reservations, but it was not possible to do so, and I was unable to get any gasoline, so it was not possible for me to go down there. I talked to Mr. Hall again by phone. He told me then he had [20] placed *his some* ads in papers there for men to enter our employ and establish this branch office, and if I could possibly get down he would like to have me do it, as he found his reservations wouldn't make it possible for him to get up here and get back in the meantime to take those up.

Q. Did he establish a branch office down there to your knowledge? A. Yes.

Q. Can you tell us approximately when that was? A. That was in 1945.

Q. And that office is still there at the present time, is it?

A. Well, it is in the Los Angeles area. I understand they moved from their original location in Glendale.

Q. Who was in charge of that office down here, so far as you know? A. Mr. Heinen.

* * *

Q. With whom did you deal after this branch office was opened?

A. We continued our dealings by and large with the Gravely Motor Plow & Cultivator Company at Dunbar.

(Testimony of David E. Graves.)

Q. That is in West Virginia?

A. That is in West Virginia.

Q. From whom did your responses come in regard to any communications you made since to the Gravely Company at Dunbar? [21]

A. Usually from Mr. Hall; and sometimes from Mr. Thomas.

Q. Were any of your letters sent back there ever answered out here?

A. Yes, occasionanny we would hear from Mr. Heinen in answer to our letters which indicated our letters had been sent out here.

Q. And if, as I understand you, Mr. Heinen would answer inquiries and correspondence which you sent back to Dunbar—is that correct?

A. That is correct.

Q. You, in other words, had dealing from both ends, both from Dunbar and from Los Angeles?

A. Yes, occasionally in writing to the Dunbar office I would send a copy down to Gravely Pacific Company, Mr. Heinen.

Q. Now, did Mr. Heinen come up here and call on you? A. Yes, he did.

Q. Did he have any discussions with you about your establishment and the type of premises that you had? A. Yes, he did. [22]

* * *

Q. One other question. As to these 122 tractors that you ordered and which you were going to purchase from the defendant Gravely Motor Plow &

(Testimony of David E. Graves.)

Cultivator Company, you have told us you were required to pay for those by a sight draft drawn against the bill of lading, is that correct?

Q. That was before you in turn collected from the person to whom you finally sold them?

A. Yes.

Q. Were you at all times ready, willing and able up to the time of the filing of this suit to pay for the tractors you had ordered in that group of 122?

A. Prior to the filing of the suit, yes.

Q. I hand you a letter here signed by Mr. Heinen, and I think you have identified him as the gentleman here in court who is in charge of the Los Angeles office, and I ask you if that is a letter you received from him.

A. Yes, I received that.

Mr. Carroll: We offer this in evidence.

Mr. Tenney: No objection, your Honor. [29]

The Court: It will be admitted in evidence as Plaintiff's Exhibit No. 3. [30]

* * *

Cross-Examination

Mr. Tenney: We will offer this stipulation in line with the Court's suggestion in order to save time: We will stipulate that Mr. Graves was a dealer in Gravely products in California, a non-exclusive dealer of those products in any portion of California after 1940, and with that stipulation we can avoid what we are going through. [56]

* * *

(Testimony of David E. Graves.)

Mr. Carroll: I would suggest this, if your Honor please: It is admitted apparently, regardless of counsel's stipulation, that this company has been the agent in Northern California since 1925, it and its predecessor company.

Mr. Tenney: It is admitted that they have been a dealer.

Mr. Carroll: And they were a dealer at the time they made these sales for which we have brought suit to recover here.

Mr. Tenney: That is correct, but our stipulation would be that they were a non-exclusive dealer. [58]

* * *

Q. (By Mr. Tenney): Mr. Graves, you know Mr. Heinen, who is in court? A. Yes.

Q. When did you first meet Mr. Heinen?

A. I think it was the latter part of 1945.

Q. Did you know at that time that Mr. Heinen was connected with Gravelly Pacific, Inc., a corporation? A. I did.

Q. You knew he was the managing agent of that corporation, did you not?

A. I understood so.

Q. And you continued to have dealings with Mr. Heinen from the time you first met him in 1940 up to the time you received the [66] letter from him of August 23, 1946, did you not?

A. Yes, we dealt with him.

* * *

Q. I will show you this letter dated April 12,

(Testimony of David E. Graves.)

1946. We will have no difficulty with this one. It is your signature, I am sure.

A. That is all right. [67]

* * *

Q. (By Mr. Tenney): Counsel has given me this letter, Mr. Graves. I will give it to you to read. I am sure you wrote it. It is out of your file.

A. Yes, sir.

Mr. Tenney: We offer this letter in evidence, your Honor.

The Court: It may be admitted.

Letter from John W. Heinen to D. E. Graves dated April 27, 1946, was received in evidence, marked Defendants' Exhibit S, and read.)

Q. (By Mr. Tenney): I now show you, Mr. Graves, a letter bearing your signature dated May 3, 1946, and ask you if you wrote that.

A. Yes, sir.

Mr. Tenney: We offer this in evidence, if your Honor please.

Mr. Carroll: No objection.

(Letter from D. E. Graves to Gravely Pacific, Inc., dated May 2, 1946, was received in evidence, marked Defendants' Exhibit T, and read.)

Q. (By Mr. Tenney): I now show you what purports to be a copy of a letter written to you by Mr. Heinen, Mr. Graves, dated May 9, 1946, and ask you if you received that letter. [68]

A. Yes, sir.

(Testimony of David E. Graves.)

Mr. Tenney: We offer this in evidence, if your Honor please, as defendants' next exhibit.

The Court: It may be admitted.

(Letter from John W. Heinen to D. E. Graves dated May 9, 1946, was received in evidence, marked Defendants' Exhibit U, and read.)

Q. (By Mr. Tenney): I show you a letter which your counsel has handed us, Mr. Graves, which is from Mr. Heinen to you dated June 1, 1946. I take it you received that letter?

A. Yes, sir.

Mr. Tenney: This letter, if your Honor please, is from the Gravely Pacific, Inc., dated June 1, 1946, addressed to H. V. Carter Company.

The Court: That is admitted as V, isn't it?

Mr. Tenney: Yes. I overlooked offering it.

(Letter from Gravely Pacific, Inc., to D. E. Graves, dated June 1, 1946, was received in evidence, marked Defendants' Exhibit V, and read.)

Q. (By Mr. Tenney): Mr. Graves, there is a "Buy in Advance" plan referred to.

A. Pardon me, Mr. Tenney. May I see the letter on which to comment when you are through with your questions?

Q. Do you want to see the letter again?

A. Yes, sir. Did you want to question me? [69]

Q. Go ahead and make a comment if you desire.

A. The one requirement in here, it appeared a

(Testimony of David E. Graves.)

number of times in the correspondence from the Gravely Company asking that we take deposits on the tractors and forward the deposits to the Gravely Company. That was not in harmony with our policy because we were in a period of very disturbed economy.

Q. Did you ever advise Mr. Heinen——

A. I did not advise Mr. Heinen, but I did advise Mr. Hall.

Q. How did you advise him, in writing or orally?

A. I am very sure that we wrote him.

Q. I would like to have a copy of any letter.

A. That we were not accepting any deposits from any customers on any merchandise for which we could not make delivery, because of the uncertainty of financial matters, and we did not want to operate on other people's money. We did not want the money involved with any funds of ours. Consequently our policy was not to accept any deposits on any orders which we were unable to fulfill and we did not carry any deposits.

Q. You feel quite certain you so advised Mr. Hall of this in writing?

A. I believe we did. That was our policy. We did not accept any deposits for the reason I mentioned, and we did not send any deposits to Mr. Hall, because we were financially able to pay for whatever they sent us without any cash deposits on them, and some of those people, as we understand, [70] who had made cash deposits, which

(Testimony of David E. Graves.)

were made, as I understand it, on the assumption that they were to be invested in something and the interest returned to the one who made the deposit, became quite involved, and we noticed in financial reports of different concerns often times that the amount in those financial statements of deposits of customers was greater than their cash on hand, which indicated they were not very liquid, and we did not want to become involved in any such financial position. Consequently we took no cash deposits.

On this plowing, we did contact our customers, the ones to whom we had sold. We sent them form letters and followup.

Q. Have you copies of those form letters that you sent? A. I would think so.

Q. If so, I would like to have those produced.

A. I would think so. Our men and salesmen were mechanics and we really were not in the plowing or contracting business. We were in the merchandising business.

Q. You were in the business of demonstrating Gravelly products?

A. That is right. We would do that to a good prospect, a reasonable prospect. Yes, we would do that.

Q. You said something in the statement you just made here, the comment you were just making, about the difficulty of deliveries. You knew, did you not, Mr. Graves, very definitely that during the entire period of the war the production of the [71]

(Testimony of David E. Graves.)

Gravely factory was greatly curtailed, as well as many other factories, did you not?

A. I had no reason to know that because I did not visit the factory up to 1941.

Q. But you received bulletins throughout, did you not, as a Gravely dealer?

A. Those could be taken for whatever they were.

Q. But you received them, didn't you?

A. About shortages?

Q. No. Bulletins.

A. Oh, yes, we received bulletins often telling us about the half million dollar addition they had and running 24 hours a day in production.

Q. Not during the war period, was it, Mr. Graves?

A. Well, I believe so.

Q. You believe so?

A. I know they were making that addition when I was there in 1941.

Q. Mr. Graves, you knew at the start of the war Gravely production was curtailed by the order of the War Production Board to 24 per cent of what their production had been, and tractors were only to be sold under allotment to the manufacturer from the War Production Board or on priorities, didn't you?

A. There were allocations and there were regulations. [72]

Q. And you knew there were priorities?

A. That is right.

Q. Mr. Graves, there is mention made here of the Pay in Advance plan. You know about that

(Testimony of David E. Graves.)

plan; you have referred to it. That is where a customer got a priority, is it not, when he made his deposit and it was invested by the company in war bonds? That was the Pay in Advance plan, wasn't it?

A. I believe it was.

Q. Did you sell any tractors under the Pay in Advance plan?

A. I didn't consider that that was good business.

Q. After Mr. Heinen wrote you this letter of June 1, 1946, did you do anything about screening your orders and obtaining deposits from this backlog of old orders which you had?

A. No, I said before that it was not our policy to take other people's money and operate on it.

Q. So you did nothing?

A. I did not do that.

Q. I now show you a letter dated June 5, 1946, from Mr. Heinen, which was produced by your counsel. I take it you received it? You received that letter?

A. Yes.

Mr. Tenney: We offer it in evidence, if your Honor please.

The Court: It may be admitted.

(Letter from John W. Heinen to H. V. Carter Company dated June 5, 1946, was received in evidence, marked Defendants' Exhibit W, and read.)

Q. (By Mr. Tenney): I now show you a series of letters, the top one being dated July 3, 1946, letters and documents, bearing your signature. I will

(Testimony of David E. Graves.)

ask you if you sent that to Mr. Heinen at Glendale.

A. Yes, sir.

Mr. Tenney: We offer this in evidence, if your Honor please, as our exhibit next in order.

The Court: Admitted.

(The letters referred to were received in evidence, [73] marked Defendants' Exhibit X, and the letter of July 3 read.)

Q. (By Mr. Tenney): Attached to this document is an order of the H. V. Carter Company No. 31493 covering 45 Gravely Model L tractors with rubber tires and various attachments. That is the 45 tractors which make up part of this alleged claim of yours for 122, isn't that correct?

A. That is correct.

Q. And the contracts bear your signature, three copies of them. Was this contract ever signed by the Gravely Motor Plow & Cultivator Company?

A. We never received it.

Q. So you never received any signed contract back? A. No, sir.

Mr. Carroll: Do you have the answer to that letter, counsel?

Mr. Tenney: We will examine our file over the noon hour.

Mr. Carroll: Counsel, you do not make any question that this order for the 45 tractors was also submitted to the Gravely Plow and Tractor Company of West Virginia?

Mr. Tenney: I believe it was. I think we can

(Testimony of David E. Graves.)

agree that that order was submitted. May I ask you one question, please, Mr. Graves:

Q. You recognize Mr. Heinen's handwriting?

A. Mr. Heinen's?

Q. Yes. [74]

A. No, I did not. Pardon me just a moment.

Q. You have seen his signature, haven't you, on letters? A. Yes, I have.

Q. You can't state whether or not that is in Mr. Heinen's handwriting?

A. May I, for general information——

Q. Will you answer my question first?

A. Sure. I would not recognize his writing, no.

Q. Would you know whether it is his signature?

A. No, I would not.

Q. I do not expect you would be a handwriting expert, Mr. Graves.

A. No. You will notice that this order is addressed to the Gravelly Pacific Company and the Gravelly Motor Plow & Cultivator Company, Glendale and Dunbar.

Q. Yes, it is addressed to the distributor in Glendale and also to the factory, that order.

A. That is correct. And may I say, too, that Mr. Heinen told me that that had been forwarded to the factory for their signature.

Q. That the contract had been forwarded?

A. That is correct.

Q. When did Mr. Heinen tell you that? When and where?

(Testimony of David E. Graves.)

A. That is my remembrance that he did. I would sooner look through our correspondence. [75]

Q. Your remembrance is that he told you but you do not recall when and where?

A. That is right.

Q. It may have been in writing?

A. May have been, yes, sir.

Mr. Tenney: This notation I was referring to, your Honor, which appears on the letter I did not read——

Mr. Carroll: May I see that, counsel?

Mr. Tenney: Yes. It says "Contract and order not accepted."

Mr. Carroll: Let me see that.

Mr. Tenney: It is in evidence, counsel, "Contract and order not accepted."

Mr. Carroll: This is not a jury case, so I have no objection to your making the point.

Mr. Tenney: You do not think I am trying it like a jury case, do you?

Mr. Carroll: Pencil notations appearing on a letter.

Q. (By Mr. Tenney): Mr. Graves, I am showing you a letter dated June 11 addressed to you, which we received from counsel. You might want to refer to it. Did you read the attached?

A. Yes, I did.

Mr. Tenney: Very well. We offer this in evidence, if your Honor please. [76]

The Court: Admitted as Y, I believe.

(Testimony of David E. Graves.)

(Letter from John W. Heinen to D. E. Graves dated July 11, 1946, was received in evidence, marked Defendants' Exhibit Y, and read.)

* * *

Q. (By Mr. Tenney): The next letter I show you, Mr. Graves, is dated July 29, 1946, from Mr. Heinen. I ask you if you received that. You received that?

A. Yes—a very nice letter.

Mr. Tenney: I am glad you like it. We offer this in evidence.

The Court: It may be admitted as Exhibit Z.

(Letter from John W. Heinen to D. E. Graves dated July [77] 29, 1946, was received in evidence, marked Defendants' Exhibit Z, and read.)

Q. (By Mr. Tenney): The next letter, dated August 14, 1946, probably another nice letter—did you get that? A. Yes, sir.

Mr. Tenney: We offer this letter in evidence, your Honor.

The Court: It may be admitted.

(Letter from John W. Heinen to D. E. Graves dated August 14, 1946, was received in evidence, marked Defendants' Exhibit AA, and read.)

Q. (By Mr. Tenney): The next letter received

(Testimony of David E. Graves.)

from your counsel, which I take it you received from Mr. Hall, is dated September 5, 1946.

A. Yes, sir.

Q. You received that letter?

A. I received it.

Mr. Tenney: We offer this in evidence.

The Court: Admitted.

(Letter from D. Ray Hall to D. E. Graves dated September 5, 1946, was received in evidence, marked Defendants' Exhibit BB, and read.)

The Witness: May I comment on that?

Mr. Tenney: Go ahead.

The Witness: The meeting to which Mr. Hall refers was the meeting in Dunbar at the time I was taken to the building [78] they had contracted——

Q. (By Mr. Tenney): This was in October of the prior year, wasn't it, Mr. Graves?

A. That is correct, in Charleston, and that is the building which we were prepared to go ahead with provided Mr. Hall or the Gravely Company would agree to give us 70 tractors per year.

Q. That was the \$10,000 building that you referred to yesterday?

A. That is correct.

Q. If you got 70 tractors a year?

A. Yes, sir.

Q. As I understand your testimony, and correct me if I am wrong, Mr. Graves——

Mr. Carroll: I am going to object to this. The

(Testimony of David E. Graves.)

witness was in the midst of making some comments. Counsel is now interrupting him.

The Witness: The building—I explained that all yesterday.

Q. (By Mr. Tenney): You did, yes.

A. I concluded, after calculating it carefully, it would require 70 tractors a year to finance the operation, and I asked Mr. Hall if he would give us 70 tractors a year, beginning with the time we had the building ready. He said No, he would not set any time that he could make delivery. I do [79] not say that he refused to give us the tractors, but he would not agree on any specific number at any specific time. We would have to take our chance as to what would be available.

Now, this building matter was one thing that Mr. Hall—the agreement, however, with Mr. Heinen was that we would remodel the building in accordance with the arrangements made with Mr. Heinen at that time, and that we had done, of course, prior to this letter from Mr. Hall, so there seemed to be a conflict.

Q. Have you finished?

A. I think so.

Q. Now, Mr. Graves, isn't it a fact that when you were back at Dunbar in October, 1945, Mr. Hall told you he could not promise you any tractors, that you would have to take your chance?

A. No, no, of the 70 machines he could not promise us any to finance that building.

(Testimony of David E. Graves.)

Q. He could not promise you any of the 70 tractors?

A. That would go on this building plan, because that building plan would have to be something maybe a year from then owing to the scarcity of materials.

Q. How many tractors did you expect to receive at that time when you were back there?

A. At that time? I expected to receive all that we had on order. As a matter of fact, I sent him a list of all the [80] orders we had placed with them so that he could look it over prior to my arriving in Dunbar and we could discuss it.

Q. You sent in that list prior to your arriving in Dunbar? A. Yes, sir.

Q. Have you a copy of that list?

A. Yes, sir.

Mr. Tenney: Will you excuse me just a minute, your Honor? I want to look at the deposition.

Q. Mr. Hall, you recall giving your deposition in this case, don't you, on Tuesday, December 16, 1947?

A. Pardon me. My name is Graves.

Q. I beg your pardon. I was reading Mr. Hall's name, and I put it in there. Mr. Graves, you recall giving your deposition on Tuesday, December 16, 1947? A. Yes, sir.

Q. Referring to page 14, line 19, and it will be stipulated, counsel, we can use the copies without having the originals opened?

Mr. Carroll: Surely.

(Testimony of David E. Graves.)

Q. (By Mr. Tenney): I refer you to the testimony commencing on line 19, page 14, Mr. Graves. It is a question by Mr. Stevens. Will you read the answer to that question? Maybe a couple of others, and then tell us whether or not you gave the testimony at the time.

Mr. Carroll: Page 14? [81]

Mr. Tenney: Line 19.

The Witness (after examining transcript referred to): That is right.

Q. (By Mr. Tenney): You gave that testimony?

A. That had to do with that building and the machines.

Q. You do not have to explain.

If your Honor please, I would like to read the question that was asked of Mr. Graves on December 16, 1947:

“Mr. Stevens: In this letter of September 17, Mr. Graves, Mr. Hall states: ‘In other words get the building located and the man located to run the Gravely Business.’ Now, was that ever done?

“Answer: We already owned the property. Mr. Hall would never supply us, nor never give us a specific shipping date as to the number of machines. As a matter of fact, he told me verbally that he would not promise us any machines, or any other number, verbally.”

You gave that testimony?

A. I did.

(Testimony of David E. Graves.)

Q. I show you now a bulletin purporting to be issued by Gravely of February 2, 1945, and ask you if you recall receiving that bulletin, as a Gravely dealer.

A. Yes, we received that, I am quite sure.

Mr. Tenney: We will offer that in evidence, if your Honor please. [82]

The Witness: This is the one item that impressed me.

Mr. Tenney: It is not in evidence. Maybe I had better show it to you a little later. We will offer it in evidence, your Honor.

The Court: It may be admitted.

(Bulletin No. 21 dated February 2, 1945, was received in evidence and marked Defendants' Exhibit CC.)

Q. (By Mr. Tenney): Do you want to make some comment about some item in that?

A. Yes. My impression was when you said the quota was reduced to a low point, it says, "The new allotment will in all certainty be made. This number represents 76% of our 1941 sales."

Q. That was 1945, just before the end of the war, which was fortunate, wasn't it? A. Yes.

Q. When this bulletin came out.

I am not going to take the time to read this whole thing, counsel, unless you want me to. There is one thing I would like to call to Mr. Graves' attention, and that is the statement in the bulletin. "When

(Testimony of David E. Graves.)

restrictions are lifted Buy in Advance orders will be filled more quickly than a regular order.”

You recall that language being in there or seeing it in the bulletin?

A. I thought it was very unfair to those people who had been [83] waiting.

Mr. Tenney: We will ask that the last answer go out as being a voluntary statement.

The Court: That may go out.

Q. (By Mr. Tenney): I show you another bulletin dated June 17, 1945, and ask you if you recall receiving that one.

Mr. Carroll: Are you putting this in evidence, counsel?

A. I think we would have received this. I would not question it.

Mr. Tenney: That bulletin is offered.

The Court: It will be admitted.

(Bulletin dated June 17, 1945, was received in evidence and marked Defendants' Exhibit DD.) [84]

* * *

Q. (By Mr. Tenney): Mr. Graves, this morning, I showed you a copy of a letter dated April 15, 1946, purportedly addressed to you, Mr. D. E. Graves from Mr. Heinen, and you said you did not recall whether you received that letter, and it was marked for identification. Subsequently your counsel found it in your files. You did receive that letter. We now have the original. Will you state if you received that, which I assume you did?

(Testimony of David E. Graves.)

A. At any event, our office received it.

Q. Have you seen that letter before? It is addressed to you.

A. That is correct. I will say that I did, to dispose of it.

Mr. Tenney: At this time I would like to have Exhibit Q [85] for identification marked in evidence.

The Court: It will be received in evidence.

(The letter heretofore marked Defendants' Exhibit Q for Identification was received in evidence, and was read.)

Q. (By Mr. Tenney): Now, Mr. Graves, directing your attention again to the portion of this letter, "On the orders you now have on hand you should verify their authenticity and start numbering from them," did you ever verify the authenticity of those orders?

A. In the first place, in view——

Q. Will you answer the question Yes or No and then explain, please.

A. We did that before we placed the order as an acceptable order to us.

Mr. Tenney: I will submit, your Honor, he is not answering the question.

Q. After the receipt of this letter I would like you to tell me, Mr. Graves, if you verified the authenticity of the orders that you had on hand.

A. The date of that letter is what?

Q. April 15, 1946. A. Yes, we did.

(Testimony of David E. Graves.)

Q. How did you verify them?

A. We sent out form letters at intervals and contacted the people by phone, and if our men were in the territory they [86] would check with them.

Q. After the date of this letter you did that?

A. Yes, sir.

Q. And you have those form letters that were sent out?

A. Yes, sir, we have a fair sample of one.

Q. Can you show me a fair sample of that letter?

This document which counsel has handed me, is that one of the types of letters you sent out?

A. That is right.

Q. What is the date of that letter?

A. January 15, 1947.

Q. And what was the date of the termination letter you received from Mr. Heinen? Do you recall that?

A. Do you refer to his telling us we were no longer——

Q. That is correct. A. That was in 1946.

Q. August 23, 1946, subsequently confirmed by letter from Mr. Hall received some week or so after that, wasn't it?

A. We had been in contact with these customers previously.

Mr. Tenney: I would like to offer this in evidence, if your Honor please, and I am going to read it to the Court.

The Court: It may be admitted.

(Testimony of David E. Graves.)

(The letter referred to was received in evidence, marked Defendants' Exhibit EE, and read.)

Q. (By Mr. Tenney): Now, Mr. Graves, at the time of this letter of January 15, 1947, you were handling other tractor [87] lines, were you not?

Mr. Carroll: This is objected to as incompetent, irrelevant and immaterial, if your Honor please, whether he was handling other tractors or not.

The Court: I will receive the testimony. The objection is overruled.

The Witness: We were handling other tractors and we——

Q. (By Mr. Tenney): And you were also——

Mr. Carroll: Just a moment, counsel. You interrupted the witness.

Q. (By Mr. Tenney): I am sorry. Had you finished?

A. We had always handled garden tractors.

Q. How many other types of garden tractors did you handle other than Gravely?

A. We had two principal types.

Q. What were they?

A. The Ariens-Tiller and the Vaughn.

Q. Didn't you also handle the Centaur and the Beeman and the Rototiller? You have handled those at times, haven't you?

A. The Beeman and the Centaur—the Beeman must have been back in 1916 or 1917. We handled the Centaur along about the same period.

(Testimony of David E. Graves.)

Q. At any rate, at the time this letter of January 17, 1947, was written you were handling at least two other models?

A. I would like to correct that 1916 and 1917, because I was [88] not connected with that, but the company handled the Beeman.

Q. Did you hear my last question?

(Question read.)

The Court: I do not believe he answered that question.

Mr. Tenney: I thought I saw him nod his head.

The Witness: That is true.

Q. (By Mr. Tenney): At the time this letter was sent out you knew you were not going to receive any Gravely tractors, didn't you? You had been so notified?

A. I guess that was the intent of the notification.

Q. So in effect what this letter was doing was offering this potential customer, Mr. Abbott, another tractor that you were carrying; isn't that the true fact, Mr. Graves? A. Not necessarily.

Q. What was the intent of the letter?

A. To find out whether he was interested in a garden tractor, and particularly referring to his order for that Gravely tractor.

Q. If he was interested in a garden tractor what kind would you have sold him?

A. We would have sold him a Gravely tractor if we could have procured it.

(Testimony of David E. Graves.)

Q. But you had no Gravely tractor?

A. We did not.

Q. So then you would have sold him another type that you [89] carried?

Mr. Carroll: Object to this, if the Court please. It is speculative and argumentative.

Mr. Tenney: I will discontinue this line of testimony, your Honor. Withdraw that question.

Q. Will you look at this letter, Mr. Graves, of June 28, 1943, with an order, and particularly I direct your attention to the reply on the reverse side.

Mr. Carroll: May I see that?

Mr. Tenney: Yes, I showed you these this morning. Do you want to see it again?

Mr. Carroll: What is the date?

Mr. Tenney: I have forgotten.

The Witness: That is June 28, 1943. All right, we offered to take a carload.

Q. (By Mr. Tenney): You have not heard my question, Mr. Graves. You wrote that letter and received that reply on the reverse side, is that correct?

A. That is right.

Mr. Tenney: We will offer it in evidence, if your Honor please.

(Letter dated June 28, 1943, and reply were received in evidence and marked Defendants' Exhibit FF.)

Q. (By Mr. Tenney): Mr. Graves, this order No. 22837 dated June 28, 1943, addressed to Gravely

(Testimony of David E. Graves.)

Motor Plow Co., [90] Dunbar, West Virginia, covers 25 Model D Gravelly tractors and 5 Model L Gravelly tractors. The 25 Model D Gravellys are those referred to in your bill of exceptions, are they not? This particular order?

The Court: You mean the bill of particulars?

Mr. Tenney: The bill of particulars. Excuse me, your Honor.

Mr. Carroll: We will object to this. I think the document speaks for itself.

Mr. Tenney: I will show it to him.

Q. I will show you, Mr. Graves, to refresh your recollection, a copy of your bill of particulars, and do you notice that item on Order No. 22837, 25 Model D Gravelly tractors and 5 Model L Gravelly tractors. That is this order, is it not?

A. Five Model D.

Q. That is the order referred to in the bill of particulars for the 25 Model D and the 5 Model L, isn't it?

A. That is right.

Mr. Tenney: If your Honor please, the first document constituting part of this exhibit is the order 22837 dated June 28, 1943, addressed to Gravelly Motor Plow & Cultivator Company for 25 Model D Gravelly tractors and 5 Model L Gravelly tractors.

Mr. Carroll: And some other things.

Mr. Tenney: Yes, and equipment. [91]

Mr. Carroll: Yes.

Mr. Tenney: "25 Model D tool holders complete with standards and steels, 5 Model L ditto, 10 8-

(Testimony of David E. Graves.)

blade 11-inch disc. This order to be shipped from 1943-1944 allocation.”

(The letter included in Defendant’s Exhibit FF was read by Mr. Tenney.)

Q. (By Mr. Tenney): I show you now, Mr. Graves, a letter dated October 12, 1942, purporting to bear your signature.

The Court: Has GG been admitted?

The Clerk: This is FF, your Honor, the one he just read from.

Mr. Tenney: GG is coming up, your Honor.

The Court: Pardon me.

A. I surely wrote that first letter and the replies seem familiar.

Mr. Tenney: We offer this in evidence, if your Honor please.

The Court: It will be admitted.

(The correspondence between D. E. Graves and D. Ray Hall dated respectively October 12, 1942, and October 19, 1942 was received in evidence, marked Defendants’ Exhibit GG, and read.)

The Witness: Mr. Tenney, in commenting on that——

Q. (By Mr. Tenney): Go ahead if you want to comment.

A. I am of the opinion from the nature of that, that that order was accompanied by a War Production Board order from the [92] Department of

(Testimony of David E. Graves.)

Agriculture, and those tractors were rationed. They were rationed according to State allocations, and the manufacturer was giving the list, as I remember it, of the tractors which were available, and the rationing certificates were issued against the allocation permitted the manufacturer, and when a farmer—and garden tractors were principally for the production of food at that time—brought us the certificate from the War Production Board, we considered it an order from the War Production Board to deliver that piece of equipment to the party who presented the certificate to us.

Q. Then I understand from what you said your understanding of the situation was the same as Mr. Hall's in his letter to Mr. Hines when he said, "Also, this order if accepted would be subject to the conditions required by the War Production Board and which requires that all farm machinery must be rationed. But, if for farming purposes, this permission can be secured."

A. It was secured, but it was mandatory at the time. There was no option on the part of us nor the supplier. It was a mandatory order when those rationing certificates were issued.

Q. Have you any comment to make about this portion of the letter, Mr. Graves: "It is sincerely regretted we cannot accept your order only with the understanding that shipment is to be made when and if available."

A. May I comment? [93]

Q. Have you any comment to make on that?

(Testimony of David E. Graves.)

A. My comment is the War Production Board should not have issued the ration certificate, had it not been that the material was available and the manufacturer had been notified that that county or that State had that number of tractors, that they must ship to this State or to that county.

Q. You do not contend, do you, Mr. Graves, that on all those 122 orders you had rationing permits or authorization from the War Production Board, do you? A. I am discussing just this one.

Q. I am asking you another question. Do you know that? A. I do not.

Mr. Carroll: Do you know the number, counsel?

Mr. Tenney: No, I do not.

Mr. Carroll: You do not contend that is contained in the 122 orders?

Mr. Tenney: I can't tell you about the number, Mr. Carroll. The next one is a numbered order.

Q. Will you look at this letter and see if you wrote that. Did you write that letter?

A. I did.

Mr. Tenney: We will offer this in evidence, if your Honor please.

Mr. Carroll: No objection.

The Court: I may be admitted. [94]

(Order and correspondence between D. Ray Hall and E. F. Dowler and D. E. Graves and Gravelly Motor Plow & Cultivator Company dated January 10, 1944, was received in evidence, marked Defendants' Exhibit HH, and read.)

(Testimony of David E. Graves.)

Q. (By Mr. Tenney): This is the order, I take it, to Mr. Dowler? His name is on it, Paradise, California.

A. That is right.

Q. Do you want to see the bill of particulars? I think that is listed in there. I can call your attention to the number of it.

A. 23795.

Q. One Model L Gravely tractor with iron wheels, 23795, is that right?

A. That is right. That was a priority order.

Q. The letter attached is addressed to this purchaser at Paradise. Here is a copy I am going to show you, Mr. Graves, of that same letter, a mimeographed copy, and I will ask you if you have seen this, which was sent to the customers. That is the same letter I just read, Mr. Graves. Have you seen that before?

A. I presume so. It is a stock letter.

Mr. Tenney: We will offer this, if your Honor please.

Mr. Carroll: I will stipulate it may go in evidence.

Mr. Tenney: Thank you for the stipulation. It saves a lot of trouble. [95]

(Letter from D. Ray Hall, undated, was received in evidence, marked Defendants' Exhibit II.)

Q. (By Mr. Tenney): I will ask you, Mr. Graves, is it not your understanding that on the orders that were sent in, the individual orders, not the order for the 25 or 30 tractors, where you gave

(Testimony of David E. Graves.)

the names of customers, that those names were furnished at the request of the company so this letter of acknowledgment could be sent; isn't that correct?

A. I often wondered why they wanted such detail in the names.

Q. You did not answer the question.

(Question read.)

A. I presume so.

Mr. Tenney: I have already read to your Honor the letter. I want to read what is appended to the letter.

(The second page of Defendants' Exhibit II was read by Mr. Tenney.)

Q. (By Mr. Tenney): Now, Mr. Graves, you have already testified that you carried these two other lines of tractors and earlier you carried the tractors I interrogated you about, the Centaur, Beeman and Rototiller; is that correct—your company? A. Yes, sir.

Q. As I understand your testimony, Mr. Graves, it was to the effect that payment on the tractors you received from Gravely was to be sight draft against bill of lading? [96]

A. That was the factory policy.

Q. Your transactions were always handled in that manner, were they not? A. As I recall.

Q. Then you in turn bought at the list price from the factory and you made your profit on the retail to the customer, is that correct?

(Testimony of David E. Graves.)

A. That is right.

Q. And you were not working on a commission basis?

A. Unless the factory shipped direct to the customer, then they paid us a commission.

Q. Most of the transactions, practically all of them, were direct shipments to you, isn't that correct?

A. That is right.

Q. I interrogated you a little bit this morning, Mr. Graves, about the difficulties and the curtailment of production during the period of the war. Isn't it true in your business, as in many other businesses during the war, the demand far exceeded the supply?

A. Yes, it did. Well, not in all lines.

Q. It is true in Gravely, isn't it?

A. For agricultural purposes, yes, sir.

Q. For any purpose, isn't that true?

A. Not necessarily.

Q. The only people who could get them during the war were [97] those who got them on priorities for agricultural purposes, isn't that so?

A. That is what we thought until Mr. Hall told us we ought to go out and get orders for industrial uses.

Q. Didn't I understand you to testify yesterday that you were instructed by the factory to keep the prospects in line, wasn't that your testimony?

A. For future business.

Q. For future business?

A. That is right.

Q. That order for the 45 tractors of July 3, 1946, which was introduced in evidence this morn-

(Testimony of David E. Graves.)

ing, did you ever receive any acknowledgment from either Gravely Pacific, the distributor in California, or from the factory in connection with that order?

A. I did not have time this afternoon—I intended to look in our files and see what we had on that.

Q. That is pretty important. Hadn't you checked before to see if you had any acknowledgment of that order?

A. I may have, but frankly, I don't remember.

Q. But you haven't any at this time?

A. Not at this time.

Q. You can't state definitely whether or not you did?

A. No.

Mr. Carroll: Doesn't your answer admit receipt of that [98] order, counsel?

Mr. Tenney: Certainly we admit the receipt of it. It came along with the contract, Mr. Carroll.

Mr. Carroll: You admit acknowledgment of receipt of it?

Mr. Tenney: No, we do not admit the acknowledgment of receipt, because it was not acknowledged.

Mr. Carroll: I understood your answer admitted the receipt of all these orders.

Mr. Tenney: I think it is a technical point. I think the Court will pass upon whether or not it was acknowledged.

Q. You referred to a branch office being established in Los Angeles.

(Testimony of David E. Graves.)

The Court: Let me ask you a question. For our purposes here there is a distinction between receipt and acknowledgment. Does acknowledgment mean what you might call an acceptance?

Mr. Tenney: No, your Honor, the only acknowledgment we would admit is just receipt of the order. That is why we had the big discussion yesterday about the inadvertence in admitting the acceptance in the answer, which we now deny.

Mr. Carroll: The reason I raise the question now, your Honor, I understood he was asking the witness with respect to acknowledgment or receipt of the order, and I was pointing out, if I understood what counsel was going to do to his answer yesterday, although denying acceptance, he was going to [99] admit receipt of all those orders.

Mr. Tenney: We admit receipt of them. There is no question about that.

Mr. Carroll: That is the only reason I brought it up at this time.

The Court: That is admitted.

Mr. Tenney: We received orders from them.

The Court: That is admitted in the new answer.

Mr. Tenney: In the answer, but there is an express denial that they were ever accepted. I will reframe my question.

Q. You made some reference in your cross-examination this morning to a branch office in Los Angeles, and I believe you stated you first met Mr. Heinen down there, Mr. Graves, in 1945; is that right? A. That is right.

(Testimony of David E. Graves.)

Q. And in 1945 you knew that Gravely Pacific, Inc., was a separate corporation, did you not?

A. I did not.

Q. When did you first learn it was a separate corporation?

A. When we received a financial report and they were listed as one of the numerous corporations owned by the Gravely Motor Plow & Cultivator Company. That is as far as I remember it.

Q. I showed you this morning a Gravely bulletin, which you said you received on June 10, 1945, Defendants' Exhibit DD. I believe I read this portion of it to you. It is on the second [100] page: "Sales divisions established. Twelve new corporations have been established at strategic points in the United States. The controlling stock is owned by this company. The purpose of these is to help you, and will not in any way interfere with the work of each agent. It will bring the factory and its policies closer to the agent. Meetings will be planned at these new headquarters. New contracts will be furnished through these corporations outlining fully territory and other general conditions."

That was June 10, 1945. After you met Mr. Heinen your dealings were with him in connection with endeavor to obtaining new exclusive dealership, were they not?

A. That is correct. May I comment further on that, Mr. Tenney? That mentions, as I recall, fifteen corporations.

Mr. Tenney: No, I think it was eleven.

(Testimony of David E. Graves.)

The Court: Twelve, isn't it?

Mr. Tenney: Twelve.

The Witness: Twelve, more or less, at any rate. As I understand, the Gravelly Pacific is one of the 21 corporations and one of the last formed, so that would hardly have been applicable.

Q. (By Mr. Tenney): You understand it is one of the last formed? A. Well, I don't know.

Q. You wouldn't want to say that, would [101] you? A. No, sir.

Q. Between the time that you met Mr. Heinen, which was in the summer of 1945, and up to the date of his letter to you of August 23, 1946, how many tractors did you receive?

A. Between what dates?

Q. From the summer, let us say, July of 1945 to August 23, 1946, how many tractors did you receive? A. Four or five.

Q. Isn't it a fact that you received four and they were delivered by Mr. Heinen to your plant by truck?

A. We received four by truck, yes, that is correct.

Q. And those were delivered by Mr. Heinen?

A. Delivered to us, that is correct.

Q. By him? A. That is right.

Q. From Glendale?

A. I wasn't at the starting point. We got them.

Q. They brought them by truck, didn't they?

A. That is right.

(Testimony of David E. Graves.)

Q. There is one thing I wanted to ask you also about one of your exhibits here. This bulletin was shown you by your counsel yesterday and introduced in evidence as Plaintiff's Exhibit 4. I will show it to you again to refresh your recollection about it. A. Yes, sir. [102]

Q. You did not intend to have us believe that plenty of tractors were available at the time of that bulletin, did you? A. Your question again?

(Question read.)

Mr. Carroll: Intend by what, counsel? I do not quite understand the question. Is this a Gravely bulletin?

Mr. Tenney: Yes, this is a Gravely bulletin. You put it in.

Mr. Carroll: You are not asking the witness what was intended by Gravely, are you?

Mr. Tenney: I will reframe the question.

Q. You will note, Mr. Graves, that the subject of this is "Delivered Price List," isn't that right?

A. That is right.

Q. It says, "Attached is new delivered price list. This includes the price increase of July 1. We can supply these in quantity. Let us know how many you will require." That "supply these in quantity" referred to the price list, is that your understanding? A. That is right.

Q. Not tractors? A. No. [103]

(Testimony of David E. Graves.)

Redirect Examination

By Mr. Carroll:

Q. I am more interested, Mr. Graves, and we are all, in these 122 unfilled orders you had. Did the Gravely Company tell you in what order you should fill those orders when you received the machines from the Gravely Company which you had on order from them?

A. I believe we had in our files a letter definitely in which they told us that those matters are left to the discretion of the dealer, because the dealer had all these other matters.

Q. Did you write to the company to inquire specifically in that regard? I will show you the letter in a minute.

A. I may have inquired, but if I wrote them at all I would tell them our understanding of the law and the War Board regulations.

Mr. Carroll: Do you have the original of this letter? Do you have any objection to this copy?

Mr. Tenney: No objection.

Mr. Carroll: I hand you a letter of April 30, 1946, signed by the H. V. Carter Company to the Gravely Motor Plow & Cultivator Company, and ask you if you sent that letter about that time.

A. Yes, sir.

Q. Is this the reply that you received to it?

A. That is correct. [105]

Mr. Carroll: We will offer this as Plaintiff's

(Testimony of David E. Graves.)

Exhibit next in order, as one exhibit, your Honor.

(Letter of April 30, 1946, and reply were received in evidence, and marked Plaintiff's Exhibit 5.)

* * *

At this time, your Honor—it may be somewhat out of order, but so that the sequence will be complete I would like to offer in evidence, if the Court please, the certified copies of the decree of distribution in the Estate of H. V. Carter, which shows the assignment of all the assets, contracts, and so on, of the H. V. Carter Company to the plaintiff in this action, and a certified copy of a consent thereto signed by the defendant Gravely Plow & Cultivator Company.

The Court: Both as one exhibit?

Mr. Carroll: Yes, your Honor.

Mr. Tenney: We are happy to stipulate that this go in. This has to do with the 1925 contract.

Mr. Carroll: This is entered April 27, 1936, and I am referring now to the decree and order of distribution and the consent signed by the Gravely Motor Plow & Cultivator Company by D. Ray Hall, Vice President, dated the 25th day of April, [106] 1935.

The Court: Both of those exhibits will be admitted as Plaintiff's Exhibit 6. [107]

* * *

Mr. Carroll: We are referring to the occasion

(Testimony of David E. Graves.)

of your visit to which you testified to Mr. Hall in October, I believe, [110] 1945, is that correct?

A. That is correct.

Q. Was anyone else present during any conversation you may have had regarding these cancelled orders other than yourself and Mr. Hall?

A. I think not.

Q. If you had any conversation regarding these unfilled orders with Mr. Hall—and I am particularly interested whether you had any conversation about delivery of these unfilled orders—will you tell his Honor what if anything was said?

A. It is rather difficult to remember the exact words.

Q. Give us the substance of the conversation to the best of your recollection, if there was one.

A. I asked Mr. Hall—I told Mr. Hall that I had sent him that list of unfilled orders and would like to discuss it with him. I had one copy of that with me. My recollection of it was he slid it back across the table and reminded me of this extensive improvement they had made, and he said, “We will get those to you in time.”

Q. Did he at any time tell you he would not deliver those to you? A. He did not. [111]

* * *

Q. (By Mr. Carroll): State so far as you can the substance of what he said to you about the production or whatever it was that he spoke to you about, Mr. Graves.

A. He assured me they were in production on

(Testimony of David E. Graves.)

a large scale and gave me to understand that in the course of what I took to be reasonable time that we would get our back orders filled.

Q. I would like to clear up, if there is any uncertainty, and there is in my mind: Did that conversation have any [112] connection with or dependence upon your undertaking to build a new building?

A. That was an entirely separate matter.

Q. Did the testimony you have given this morning about your telling Mr. Graves and Mr. Hall that it would require 70 tractors to finance that building, did that have anything to do with your conversation concerning your unfilled orders?

A. It did not.

Q. There has been some discussion here about deposits. Did anyone ever tell you that you were required to take deposits on the orders that you received from customers?

A. Anyone connected with whom?

Q. Did Mr. Hall or the Gravely Company ever tell you that they would not want orders unless they were accompanied by deposits?

A. I believe that they later said that those accompanied by deposits and considered priority—I mean considered advance delivery, or whatever they were, would be shipped first.

Q. But did he ever tell you that he would not honor the orders that you had placed with him because you had not taken deposits from your customers?

Mr. Tenney: Did who?

(Testimony of David E. Graves.)

Mr. Carroll: Mr. Hall.

The Witness: Not to my remembrance.

Q. (By Mr. Carroll): As a matter of fact, I think you have [113] told us, or so that I won't be leading you, will you please repeat again how you were required to pay for the tractors you got from the Gravely Company?

A. We paid for them sight draft bill of lading.

Q. And that means, as I understand it, the Gravely Company drew against you as soon as they were loaded on the cars in West Virginia?

A. That is correct.

Q. And you paid for them then?

A. That is correct.

Q. The price you paid for them was what in relation to the list price?

A. They would be the list less 30, with the exception I am trying to refresh my memory, on the four that Mr. Heinen brought up there, I am of the opinion that we paid cash for them when he left them there. I am not certain on that because I have not looked at the records.

Q. At all events, the price of these to you was 30 per cent off the list price?

A. That is correct.

Q. So that if the price of the average of those tractors was \$350, the list price, you would get that for 30 per cent off, is that correct?

A. That is correct.

Q. Then in event that you sold it to a customer, the farmer, [114] your profit or commission or

(Testimony of David E. Graves.)

whatever it may be called on the transaction would be 30 per cent of the list price of \$350, is that correct? A. That is correct.

Q. I do not wish to lead you, but I think you testified to this on direct examination, that at all times up to the filing of this suit you have been ready, willing and able to pay for the price of these 122 tractors had they been put aboard for you in West Virginia? A. That is correct. [115]

* * *

JOHN WILLIAM HEINEN

called for the plaintiff; sworn.

The Clerk: Will you give your name to the Court?

The Witness: John William Heinen.

Direct Examination

By Mr. Carroll:

Q. What is your name, please?

A. John William Heinen.

Q. Where do you reside?

A. North Hollywood, California.

Q. May we have the address, please?

A. 4346 Colfax.

Q. When did you first become associated with the Gravely organization? A. In July, 1945.

Q. Will you tell us who hired you, please?

A. Mr. D. Ray Hall.

Q. Where did he hire you?

A. In Los Angeles.

(Testimony of John William Heinen.)

Q. I believe you are the manager of the Gravelly operations in Southern California, are you? [119]

A. We are the manager for the distributorship of Gravelly tractors in the State of California and three adjacent States.

Q. You are the manager here of the Gravelly Pacific Company, a corporation, are you?

A. That is right.

Q. And one of the defendants in this action?

A. Right.

Mr. Carroll: We would like the record to show, if your Honor please, that we are examining this witness pursuant to the provisions of Section (b) of Rule 43 of the Rules.

The Court: Adverse witness?

Mr. Carroll: Yes, your Honor.

Q. What are your functions down there?

A. I am the manager for the corporation.

Q. Tell us what you do, please.

A. We sell and service Gravelly tractors and equipment and appoint dealers.

Q. In the State of California?

A. In the State of California.

Q. Do you maintain a supply of parts?

A. We do.

Q. Has that been the general scope of your activities since your employment by Mr. Hall in 1945?

A. That is right.

Q. You said you appoint dealers? [120]

A. Right.

(Testimony of John William Heinen.)

Q. Have you appointed any dealers in Northern California? A. Yes.

Q. Whom did you appoint in Northern California? A. H. G. Seavey.

Q. Where is Mr. Seavey located?

A. He is in Hayward.

Q. When did you appoint him?

A. As I recall, it was the latter part of 1946, although I am not sure of the date.

Q. Has Mr. Seavey an office? A. Yes.

Q. Describe that for us, will you, please.

A. He has a regular place of business, a display front, a store on a busy boulevard.

Q. Is it in an auto court? A. No.

Mr. Tenney: If your Honor please, I do not see the materiality of this and I am going to object to it as incompetent, irrelevant and immaterial, and having no bearing on any issue in this case.

Mr. Carroll: I do not know how important it is, your Honor, either, but they tried to get rid of Mr. Graves because he did not build a building, and I think it is relevant on the question of their good faith. [121]

Mr. Tenney: I take exception to counsel's remark that we tried to get rid of Mr. Graves. The evidence would not so show.

Mr. Carroll: Let me put it this way and try to avoid any controversy with counsel. It is alleged as one of the reasons why they wished to terminate the relationship——

(Testimony of John William Heinen.)

The Court: The objection is overruled. Answer the question.

(Question read.)

Mr. Tenney: May my objection go to this entire line of questioning, your Honor?

The Court: Yes.

Q. (By Mr. Carroll): You say he is not located in an auto court?

A. The place of business is not located in an auto court.

Q. How big is his place of business?

A. I would say his building is approximately 40 by 40, 40 by 50, 60—I don't know the exact dimensions, improved building.

Q. How many employees has he?

A. He has his two sons, who help, a mechanic, and his wife, who acts as stenographer and book-keeper.

Q. You are quite sure he is not at or near an auto court?

A. Oh, yes, he is near an auto court.

Q. When did you say you appointed him? [122]

A. I should say the latter part of 1946.

Q. As a matter of fact, isn't this the true representation of the building you have been testifying to the Court about?

A. Well, this shows only one-half of the building. It does not show the display on this side.

Q. That is the front of the building, is it not?

A. This is one-half of the front, yes, sir.

(Testimony of John William Heinen.)

Mr. Carroll: I will ask that this be admitted in evidence, if the Court please, as plaintiff's next in order.

Mr. Tenney: I make my same objection, your Honor.

The Court: It will be admitted.

(The photograph referred to was received in evidence and marked Plaintiff's Exhibit 9.)

Q. (By Mr. Carroll): Whom did you consult with when you were about to appoint Mr. Sibby?

A. We consulted with the president of our corporation, Mr. D. Ray Hall.

Q. I asked you whom you consulted. A. I.

Q. Were you using that as the editorial "we"?

A. Possibly.

Q. You mean that you consulted with him?

A. Right.

Q. With whom did you consult about your visits to Mr. Graves? A. No one. [123]

Q. What?

A. That was purely voluntary on my part.

Q. Did you not report your visits to Mr. Graves to Mr. Hall? A. Yes.

Q. Then you did consult with Mr. Hall?

A. After the visits, yes.

Q. When you appointed other dealers did you report it to Mr. Hall? A. Yes, sir.

Q. Reported to Mr. Hall about the supplies you had here in California? A. Yes, sir.

Q. And about the accounts you were servicing?

(Testimony of John William Heinen.)

A. Yes.

Q. And the Gravely Company—I do not mean the Gravely Pacific Company—but the parent company sent you lists of prospects in Southern California, did it not? A. Yes. [124]

* * *

Q. (By Mr. Carroll): You made the termination on Mr. Hall's [130] authorization, did you not?

A. Through his original permission, naturally, instructions.

Q. And acting as his agent?

A. Acting as his agent.

Q. And you also undertook, acting as his agent, to terminate any contractual relationship which the Carter Company had with the factory?

A. No, to the Gravely Motor Plow, no.

Q. Will you listen to this: "You may consider this letter an abrogation of any contractual obligations you may have felt you had with us or with our factory." Is it still your testimony to his Honor that you did not undertake to terminate the contractual relationship that the Carter Company had with the factory? A. Right.

Q. Did you perform any other functions out here for Mr. Hall that you have not told us about?

A. Not that I recall.

Q. You serviced their accounts so far as labor goes? A. Right.

Q. When the Gravely Company received inquiries, it sent them out here for you to service?

(Testimony of John William Heinen.)

A. Right.

Q. Did you do that all over California or just Southern California? [131]

A. Mostly in Southern California.

Q. And they sent you lists of prospects from the Gravely Motor Plow & Cultivator Company?

A. Right.

Q. And you investigated those prospects?

A. Right.

Q. And you reported back? A. Right.

Q. As a matter of fact, you were required to file reports for the Gravely Motor Plow and Cultivator Company in regard to that list of prospects, were you not?

A. New accounts that were good, yes.

Q. Doesn't that prospect list that they sent you have a space underneath saying "report back" in which you fill a report of the results of your interview with the prospect?

A. Our particular list did not have that.

Q. But you have reported back, results of your interviews with prospects? A. Yes.

Q. If any complaints or difficulties arise with the users of equipment of the Gravely Motor Plow and Cultivator Company in Southern California, do you take care of those? A. Yes.

Q. That has been your practice since you have been appointed? A. Yes. [132]

Q. And they have asked you this, but you did service machines that are sold by the Gravely Motor Plow and Cultivator Company in California?

(Testimony of John William Heinen.)

A. Within our territory, yes.

Q. And you maintain the parts that are available for Southern California for the Gravely Motor Plow and Cultivator Company, do you not?

A. We maintain it for our corporation here to service the accounts, yes, sir.

Q. And you do service the Gravely Motor Plow and Cultivator accounts from those parts, do you not?

A. Right.

Q. Do you keep any staff of repair people?

A. Yes.

Q. And that is to service these Gravely products that are being used in the southern part of the state?

A. Right. [133]

* * *

D. RAY HALL

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you give the Court your full name?

The Witness: D. Ray Hall, Dunbar, West Virginia.

Direct Examination

By Mr. Carroll:

Q. What is your name? A. D. Ray Hall.

Q. Where do you live, Mr. Hall?

A. In Dunbar, West Virginia.

Q. What is your position with the Gravely Motor Plow and Cultivator Company?

A. I am president of the corporation.

(Testimony of D. Ray Hall.)

Q. How long have you been president?

A. Since 1936.

Q. You are also president of this West Virginia corporation known as the Gravely Pacific Company, are you not?

A. That is right. [135]

* * *

Q. Who are the other officers of the Gravely Motor Plow and Cultivator Company, please?

A. The Gravely Motor Plow and Cultivator Company—I am president of it, Kenneth Thomas is vice-president and secretary. That is the extent of the officers of it.

Q. Don't you have a treasurer?

A. I beg your pardon. Kenneth Thomas is—may I be excused to get my briefcase? I think it is there.

Q. That is what I have been trying to get.

A. That is all right, but your question asked for finances.

The Court: Just a minute, now. Wait until we have the proper questions here.

Q. (By Mr. Carroll): Did you want to look at something in your briefcase, Mr. Hall?

A. Yes, please. [136]

Q. May I ask you one question before you look at those, Mr. Hall?

A. Go ahead.

Q. Don't you remember now who the treasurer of your company is without looking at your notes?

A. I am president of twenty-three different corporations and I know that I am president of it. I am not sure of all the officers.

(Testimony of D. Ray Hall.)

Q. Without looking at your notes——

A. Do you want the——

Q. Just a minute, Mr. Hall. The lawyers can ask the question here. Do you mean to tell us that you do not know who is the treasurer of the Gravely Motor Plow and Cultivator Company without consulting your notes? A. Certainly.

Q. You do not know? A. I do know.

Q. You know now? A. Yes.

Q. I thought you did not remember a minute ago.

A. Well——

Q. At all events, you remember now, do you?

A. Yes.

Q. Who is the treasurer?

A. The treasurer is V. D. Tippet. [137]

Q. How long has Mr. Thomas been with the company?

A. I would estimate since approximately 1933 or 1934.

Q. How long has he been the vice-president?

A. Mr. Thomas is not the vice-president.

Q. I thought you told me he was the vice-president and secretary.

A. Mr. Thomas is secretary.

Q. Was that a mistake when you told me he was the vice-president? A. That is right.

Q. How long has he been secretary then?

A. The same period of time.

Q. How long has Mr. Tippet been the treasurer?

A. I would say possibly 1938. These are from my memory, as far as the length of time.

(Testimony of D. Ray Hall.)

Q. Do you wish to add another officer at this time to the officers of the Gravely Motor Plow and Cultivator Company?

A. The vice-president of the Gravely Motor Plow and Cultivator Company is A. D. Williams.

Q. How long has Mr. Williams been vice-president?

A. From my memory I would say approximately 1940.

Q. What are those records you are testifying from?

A. These are notes as to the information you asked me for.

Q. Where did you get those notes?

A. From the records of our company, or from our secretary, Mr. Kenneth Thomas.

Q. When did you get these from Mr. [138] Thomas?

A. In the last week, I don't remember the exact date.

Q. Did you get them back there before you came out? A. Certainly.

Q. So you did have the books available at that time?

A. Not the books you asked for. The names of the officers you asked for, which you already have.

Q. But the books were available to you before you left?

A. Not the information that you asked for.

Q. Who are the officers of Gravely Pacific Company?

(Testimony of D. Ray Hall.)

A. Myself as president; Sybil Hall, vice-president; A. G. Thompson, secretary; Kenneth Thomas, treasurer.

Q. I got you, Mr. Hall, and I have Mr. Thomas as treasurer, and Sybil Hall, vice-president; A. G. Thompson, secretary. How long has Mr. Thompson been with you? Is that a Mr. or Miss?

A. Mr. A. G. Thompson. How long has he been connected with the Gravelly Pacific, Inc.? Since its inception.

Q. How long has he been connected with you?

A. With me? He has no connection with me. He is connected as counsel for the Gravelly Motor Plow and Cultivator Company.

Q. In other words, Mr. Thompson, whose position you said was secretary——

A. Secretary.

Q. Mr. Thompson, secretary of the Gravelly Pacific Company, is one of the general counsel for the Gravelly Motor Plow and Cultivator [139] Company?

A. That's right.

Q. Kenneth Thomas, whom you say is the treasurer of the Gravelly Pacific Company, is also the secretary of the Gravelly Motor Plow and Cultivator Company?

A. That is true.

Q. And Mr. D. Ray Hall, who is the president of the Gravelly Pacific Company, is the president of the Gravelly Motor Plow and Cultivator Company, is that true?

A. That is true.

Q. Will you tell the Court, please, who is Sybil Hall?

A. That is my wife.

(Testimony of D. Ray Hall.)

Q. I presume you know this: Who is the owner of the stock of the Gravely Pacific Company?

A. The Gravely Pacific Company is owned mainly by Gravely Motor Plow and Cultivator Company, an entirely separate organization, a corporation.

Q. Just a minute, Mr. Hall. I was just asking you one question, Mr. Hall, and if your attorney wants you to answer the others, he will ask you. Please answer my questions as I ask them of you. I asked you who was the owner of the stock of the Gravely Pacific Company?

A. The Gravely Motor Plow Company owns the great majority of the stock. I am also a stockholder, Sybil Hall is a stockholder, and Kenneth Thomas is a stockholder.

Q. How much stock does Mr. Thomas [140] own?

A. One share each for myself and the three individuals mentioned.

Q. In other words, the Gravely Pacific Company, the stock of that company, is owned outright and entirely by the Gravely Motor Plow and Cultivator Company except for three qualifying shares, one of which is owned by you, one by your wife, and one by Mr. Thomas, who is, in addition to his other offices, the secretary of the Gravely Motor Plow and Cultivator Company?

A. That is right, but there is only 25 or 30 shares in that Gravely Pacific Company and three of those are owned by individuals.

(Testimony of D. Ray Hall.)

Q. That was true in 1947 and 1946?

A. That is right.

Q. Since the organization of the company?

A. That is right.

Q. Is that the same setup as to the other 19 subsidiary corporations to which you referred?

A. 21 separate corporations for distributing and selling our products.

Q. And the stock ownership is the same?

A. No, they are not the same in all of them at all.

Q. It is different in the case of Gravely Pacific?

A. As far as the qualifying shares, as you call them, which represents a certain portion of those, the Gravely Motor Plow and Cultivator Company have now controlling stock in all these [141] corporations as they were established for the purpose of selling, distributing and serving Gravely Motor Plow Company's products.

Q. Mr. Hall, the Carter Company represented you out here for a great many years, did it not?

A. Periodically. And much to our dissatisfaction at times. Numerous changes were made in their distributorship due to the fact that they did not successfully handle the business.

Q. They represented you from 1925, counting the predecessor company, up to 1946, did it not?

A. No, they did not. Their contract originally was with the Gravely Motor Plow and Cultivator Company, and then this territory was allotted to L. H. Weber who was the distributor of these, and

(Testimony of D. Ray Hall.)

the Carter Company represented L. H. Weber for a certain period of time, and then Mr. L. H. Weber was replaced as a distribtuor and the H. V. Carter dealt directly with the Gravely Motor Plow and Cultivator Company for a period from 1940, due to the contract that was read here, for a period of some time. Then in 1945 when the separate corporations were formed the Carter Company became associated through Gravely Pacific Company, Inc.

Q. Do you deny you continued to deal from 1925 to 1946 with H. V. Carter Company personally yourself during this whole period?

A. No, we did not deny that. [142]

Q. As a matter of fact, you have, have you not?

A. When you say "deal," what do you mean?

Q. Correspond, negotiate, send them orders, send them letters, to go out and get business, send them invoices soliciting business and anything else comprehended under the general term of doing business with an organization.

A. The Gravely Motor Plow as manufacturers would send that material to any dealer working under any distributorship with it.

Q. As a matter of fact, you did send them during that period of time, to the Carter Company, the plaintiff in this case, did you not?

Q. During the war, Mr. Hall, the beginning of the war, you were very much concerned, were you not, with keeping alive the public demand for the Gravely product?

A. Naturally.

(Testimony of D. Ray Hall.)

Q. As early as 1942 and 1943 you continually advertised as you had previous to the war for the Gravely products, did you not?

A. Certainly any aggressive manufacturer would do the same.

Q. You urged all of your dealers, including the plaintiff in this case, to take all the orders they could, did you not?

A. I wouldn't say that, no. The dealers were informed by bulletin, some of which have been read here, as to the conditions that existed at that time. They were allowed to sell [143] tractors—I mean we did not control the dealers as to how many tractors they sold or who they sold to. The dealers working under distributorships would be at liberty to sell tractors.

Mr. Carroll: While I think of it, your Honor, my colleague reminded me, I would like the record to show that this witness is also being examined as an adverse witness.

The Court: I was wondering why there weren't objections to leading questions.

Mr. Tenney: I was going to ask if I could cross-examine him.

Q. (By Mr. Carroll): Did I understand you to say that you did not ask the dealers to sell all the Gravely tractors they could?

A. The way you state that, it would be impossible to answer a question like that, to sell all they could. The dealers were informed of conditions that existed.

(Testimony of D. Ray Hall.)

During the war period all of our production was allocated. In other words, the war production board during the war period, each manufacturer of farm machinery was restricted as to what it could make and by different limitation orders. The dealers were informed of that through bulletins, and as to the percentage of our production that we were allowed to make as to how those were distributed to dealers, of course, that was not told to them because that would depend on other factors. The distribution of farm equipment part of the time was rationed, and the rationing [144] permit was not an order for the manufacturer, but on the dealer, that if he had the material in stock he would have to deliver that. The rationing permit did not extend to the manufacturer.

Q. Did you not as early as 1942 and 1943 continually urge all your dealers, including the plaintiff in this action, to go out and take all the orders they could get for delivery after the war?

A. We did not, except under the conditions I told you in our bulletins and we had other plans that we mentioned, the buy-in-advance plan, which we urged all our dealers to take advantage of.

Q. You do not deny, do you, that you urged all of your dealers to go out and take orders for just as many Gravely tractors as they could?

A. I answered that once.

Q. Will you answer that again?

A. No, I won't answer it again. You asked if we continually urged them. I said no, except through

(Testimony of D. Ray Hall.)

our bulletins and through particular kinds of orders that we had.

Q. You admit that you urged not only the dealers but the public—you urged the public to place orders for your product as early as 1943 on the so-called buy or lay-away plan.

Mr. Tenney: Buy-in-advance plan, counsel.

The Witness: Surely we did. We urged the user to buy [145] our tractors through the dealers in ordinary conditions that existed at that time, without any promise of delivery.

Q. Didn't you tell all of them you would get them to them as fast as you could? A. Certainly.

Q. And you did not tell them that it would not be 1945, did you?

A. It would be impossible for us to have told them anything, as far as when the war would be over.

Q. But you did urge them to place orders for delivery as soon as available? A. Surely.

Q. And you urged your dealers to take all of the orders of that sort that they could get, did you not?

A. We urged our dealers or organizations to sell under the conditions that existed at that time and to sell with the understanding that the orders would be taken under the restriction that was in effect at that time.

Q. We are talking now about your buy-in-advance orders. Didn't you say to your dealers, including the plaintiff in this action, "Go on and get all the

(Testimony of D. Ray Hall.)

buy-in-advance orders that you can get for delivery when the supplies are available''?

A. I don't remember making a statement like that. That would be in our policy, of course.

Q. Do you deny that that was your policy? [146]

Mr. Tenney: Just a minute. Have you finished your answer?

Mr. Carroll: Had you finished?

A. No, I had not. The buy-in-advance plan was a plan conceived during the war period. We knew our tractor was not available to the public in the quantity that was demanded, so we conceived a plan whereby we authorized our different sales agencies to take orders, or we would take them directly in the dealer's territory, and we gave the serial number as to when that order would be delivered, but that pamphlet *plainly* the conditions that delivery would not be made until the war was over and the restrictions removed and the material available so we could bill our product. Those are not the kind of orders you mention in your bill of complaint. The Carter Company took none of those.

Q. If you will, Mr. Hall, confine your attention to the questions, I think we will get along better. The orders I am asking you about now are your orders which you are referring to as buy-in-advance orders, that is what I am questioning you about and not the orders you have just been discoursing about.

A. I beg your pardon. That is what I was explaining, the buy-in-advance orders.

(Testimony of D. Ray Hall.)

Q. I ask you once again if you did not instruct your dealers to get all the buy-in-advance orders that they could in 1943?

A. It would be our normal policy to encourage all our dealers [147] to sell on that basis.

Q. Did you not do so in 1943? I am not asking what your normal policy was.

A. I would not be able to recall back in 1943, particularly in that year that it was introduced or what not; I don't remember.

Q. You do not recall sending out bulletin after bulletin importuning your dealers to take all the buy-in-advance orders that they could in 1943?

A. I wouldn't remember right off. We sent bulletins out all during the war period. I wouldn't recall as to what particular years they refer to, but our policy was to encourage dealers to take buy-in-advance orders, yes.

Q. Don't you recall that you importuned all your dealers, including the plaintiff in this action, to go out in 1944 and take more orders than they took in 1943, buy-in-advance orders?

A. Are you referring only to buy-in-advance orders?

(Question read.)

A. On buy-in-advance orders or any orders we encouraged our dealers to take orders under conditions that existed with the explanation that delivery was not to be made, we could not deliver, as our form said, but with the idea in mind that all the

(Testimony of D. Ray Hall.)

people who would buy our product under the conditions, that they would wait until they could get delivery.

Q. Will you answer the question I asked [148] you? A. I think I did.

The Court: Read the question.

(Question read.)

A. I do not know how I just answered that, but our policy was——

Mr. Carroll: I asked you to answer the question.

A. I don't think that question can be answered "yes" or "no."

Mr. Carroll: I submit it can.

The Court: As I understand it, Mr. Hall, you have in mind efforts to secure orders in 1943. This question can be answered. Did you request your dealers to increase the orders over the number of orders they had in 1943?

The Witness: Not increase orders any more than to continue in their efforts to sell those same orders. Yes, we did that.

Q. (By Mr. Carroll): Did you issue those to all your dealers and representatives? (Handing document to witness.) I direct your attention particularly to the front page.

A. Yes, this was sent to all dealers.

Mr. Carroll: We ask that it be admitted in evidence, if the Court please, as plaintiff's next in order.

(Testimony of D. Ray Hall.)

Mr. Tenney: We have no objection, counsel.

(Whereupon the document referred to was received in evidence and referred to as Plaintiff's Exhibit No. 10.)

Q. (By Mr. Carroll): Let us see if this refreshes your recollection about whether or not you did not ask your dealers to go out [149] in 1944 and take more orders than they had taken before?

Mr. Tenney: What kind of orders are you referring to now, counsel?

Mr. Carroll: Counsel, I am talking about buy-in-advance orders.

The Court: Let us keep in mind so there won't be any misunderstanding about it. We are talking about what now?

Mr. Carroll: These buy-in-advance orders, your Honor:

"In 1943 we offered Gravely agents our buy-in-advance. Was it a success? Let's look at the record:"

Q. That is the caption of this, is it not?

A. Yes.

Q. "We asked for a deposit of \$25.00 with each buy-in-advance order. The first order was received on March 4, 1943 and by December 31, 1943 we had received over \$21,000 cash deposits on buy-in-advance orders!!

"Gravely agents have hundreds of orders on file and ready for delivery when production per-

(Testimony of D. Ray Hall.)

mits.—Uncle Sam has several thousands of dollars in war bonds that might not be otherwise.

“This is not the end of buy-in-advance orders. We are asking you to take more orders than ever before in 1944.”

Do you deny now that you asked your agents to go out and take more orders than ever before in 1944?

A. That particular bulletin answers itself. [150]

Q. I ask you if you still deny——

Mr. Tenney: Just a minute. Have you finished your answer?

The Witness: No, I had not. That bulletin is self-explanatory. As I said before, we encouraged our dealers to take more orders.

Q. (By Mr. Carroll): Have you finished your answer, Mr. Hall? A. I am through.

Q. You were not correct when you testified a few minutes ago that you did not ask your agents to go out and take more of these buy-in-advance orders in 1944.

A. As it reads there, that is the way it should be, yes.

Q. You were in error when you said previously it was not this way?

A. No, I was not in error in my statement.

The Court: I do not think the witness testified to the contrary of that.

Mr. Carroll: I got the impression he did not ad-

(Testimony of D. Ray Hall.)

mit any acceleration of this in 1944. That is the point I was trying to make.

The Court: I think we have a fencing duel between the counsel and the witness.

Mr. Carroll: I have some more of these things, if your Honor please, that I would like to come back to tomorrow, but I can save a little time if I go over them this evening, so I would like permission, if I think it wise, to return to this [151] particular aspect of the examination in the morning. I can use up the rest of the time, however, on something else.

Q. On all the orders of all characters that you received for future delivery, you sent a letter to the name of the customer that was sent in to you, did you not?

A. If we had that order. We encouraged our dealers to report their orders back to us with the name of the people they sold to, with the very idea in mind of furnishing them with the conditions that existed during the war period, as the form letter stated, that they would not expect delivery until they were available. Those acknowledgements in no way implied that the order was accepted or that the order was directed to the Gravelly Motor Plow and Cultivator Company; it was simply to inform them of the conditions that existed at that time.

Mr. Carroll: I ask that that answer be stricken as not responsive.

The Court: It may go out.

(Testimony of D. Ray Hall.)

Mr. Carroll: You did send a letter to the names of the persons who were to get these tractors, did you not?

A. We sent letters to all people, all the Gravely people—all the individuals, companies or what not who placed orders for our products, that we were advised of.

Q. As a matter of fact, you required the plaintiff in this case to send you the names of the persons from whom he had taken orders for tractors? [152]

A. We had no way to require that. We requested that.

Q. You did not require it?

A. So far as requiring is concerned, we encouraged, is a better word to use.

Q. Was it optional?

A. Surely, it was not legally required to report those orders.

Q. On other words, it was optional with Mr. Graves and, so far as you were concerned, it was all right with you if he did not send in the names of the persons from whom he took the orders?

A. He probably did not, all the orders he took at that time.

Mr. Carroll: I ask that that be stricken as not responsive.

The Court: It may go out.

(Question read.)

(Testimony of D. Ray Hall.)

A. It is difficult to answer that question "yes" or "no."

Q. (By Mr. Carroll): Was he required to do so under the terms of your arrangements with him? You can answer that "yes" or "no," I think.

A. At that particular time you refer to—what year?

Q. 1944, 1945, and 1946.

A. At that time Mr. Graves had no contract with the Gravely Motor Plow and Cultivator Company, as far as any contract was concerned, and we encouraged, would be the better word to use, him to do this, but we had no way of requiring it because he had no contract stating that he had the [153] agency.

Q. And then your answer is, he was not required to send you any names?

A. That is right.

Q. He did send, and your answer admits, that you received orders over this period from the plaintiff in this action. You know that?

A. Oh, yes.

Mr. Tenney: What periods are you referring to? I assume it is 1944.

Mr. Carroll: 1944, 1945, and 1946.

Q. You are familiar with that fact?

A. Yes, I remember those.

* * *

Q. (By Mr. Carroll): Mr. Hall, I may have asked you this before, but so it will be clear in the record, in the second [161] year of the war, January

(Testimony of D. Ray Hall.)

of '43, you told your agents to go out and get all the orders they could for delivery as soon as possible, didn't you?

A. Yes. Some questions can be possibly answered "yes" and "no." I don't think that is. State the question again, please.

Q. I asked you if, at the beginning of the second year of the war, in January of 1943, you did not go out and ask your agents to take orders for all the tractors they could get for delivery as soon as possible?

A. We encouraged them to do that.

The Court: You can answer that yes or no, and then if you desire to, you may offer some explanation.

Q. (By Mr. Carroll): Did you not ask your agents, including the plaintiff in this case, to go and do that?

A. Yes, we did. We explained that by our bulletins and by our letters and by our personal contact, the conditions which existed and the types of orders that we suggested and recommended and encouraged that they take.

Q. Well, do you mean you didn't urge them to go out and take a straight order for delivery as soon as it could be made?

A. I would say "yes," but with the explanation that I made.

Q. Well, you certainly—you say you told them certain types of orders; are there any types of or-

(Testimony of D. Ray Hall.)

ders you told them not to take? A. No. [162]

Q. In other words, you told them to go out and get all the orders they could, didn't you?

A. I say, "yes," with the explanation that I made, that I said, to take the orders that they could with the conditions that existed at that time and under the conditions that existed——

Q. Wasn't the only condition that you would make delivery as soon as you could?

A. No, that was not the only condition. The dealers could take orders with a priority rating, which would secure delivery. They could take orders under the plan we had of buying advance—a buy in advance plan—which plainly indicates as to when delivery would be made. They could also take orders of a general nature, which we encourage everyone to take, and with the understanding that delivery would be when available—but without any assurance as to when they would be delivered.

Q. But you told them to take an order for delivery as soon as possible in the later case, did you?

A. That's right, with the qualifications I have made.

Q. I show you this document here, dated January 1, 1943, on the stationery of your company, directed to all dealers and distributors, and ask you if that is one of the bulletins that you sent out to your dealers? (Handing to witness.)

A. That's right.

(Testimony of D. Ray Hall.)

Mr. Carroll: We offer this in evidence, if the Court [163] please, plaintiff's next in order.

Mr. Tenney: No objection, your Honor.

The Court: It may be admitted as Exhibit 12, I believe?

The Clerk: It is No. 12, your Honor.

(Document dated January 1, 1943, was then received in evidence as Plaintiff's Exhibit No. 12.)

Q. (By Mr. Carroll): We have discussed various things in this; I don't want to read all of them, in the interest of not burdening the record. I notice on page 5 of this bulletin you say this:

"New orders: Take just as many orders as you can. Tell everyone the true facts on delivery. In other words, no promises whatever excepting that after the picture changes naturally our backlog of orders will be filled in order.

"We don't want to slacken your efforts to sell our equipment for agricultural work. Sell the customer on the merits of the Gravely and on the thought of getting the equipment when you are able to furnish it."

Mr. Tenney: When was it?

Q. (By Mr. Carroll): "When you are able to furnish it."

"Remember also, that by cooperating in selling the D whenever you can, you are making it possible for us to furnish you with more ma-

(Testimony of D. Ray Hall.)

chines than we could Model L's. We are not going to try to hide the L from our customers. We [164] will continue to advertise this machine and we want as many prospective buyers to see it as possible. But, we will have to explain to them that our production is restricted and that seventy-five per cent of our products are going directly into the war effort."

That is what you told the plaintiff in this action in January, January 1 of 1943, isn't it?

A. That's correct. I think that is a very good analysis of the situation as it existed then.

* * *

Q. (By Mr. Carroll): Now so that you will be oriented, let me take you back to a different subject, Mr. Hall. I am showing you here Plaintiff's No. 2, for the record, and you can tell us [165] what this is, can you (handing to witness)?

A. Yes, sir.

Q. And what is it, please?

A. This purports to be a copy of an order that the Carter Company placed with us reporting a sale sold to a certain buyer of our product.

Q. And it is an order to you for shipment to the plaintiff in this action of a certain tractor, is it not?

A. That's right.

Q. And in accordance with your regular custom, when that tractor was shipped, you would draw against them on a sight draft as soon as you put it aboard in West Virginia?

A. That's right.

(Testimony of D. Ray Hall.)

Q. Now, what is the card that is attached to that? By the way, that was introduced in evidence here earlier, Mr. Hall?

A. That's right, I know about that.

Q. As typical of one of the orders we are in dispute about in this case. Now the card that is attached to that order is what?

A. That would purport to be simply an office acknowledgment from our office of the Gravely Motor Plow Company letting the Carter Company know that we had received those orders, and which would also purport to let him know that they had—or normal acknowledgement as to the copies that has been introduced before, stating the conditions under which the order was being placed.

Q. And that was your regular practice, was it? [166]

A. That is true.

Q. And letting Mr. Graves and his company know that you had sent a letter directly to the person who was named and indicated on the order as the person who was ultimately to get the machinery?

A. That's right.

Q. And I think you referred to some of the exhibits that have been introduced before here as typical of those letters, is that correct?

A. That's right. Those also pointed out that the order was placed with the Carter Company, that although we appreciated it and that delivery would be as soon as possible, and so forth——

Q. That was the same letter you sent to all persons who were indicated on orders as persons

(Testimony of D. Ray Hall.)

who were to receive machines, is that not right?

A. On all the orders that was reported directly to the factories from dealers that we had in the field. I might explain the purpose of those acknowledgments was simply——

Q. Well, what I was asking you—we will go ahead, and you can tell us the purpose if you want to.

A. Well, some of the things are hard to understand. The reason we wanted these explanations, with the names on there, was to simply try to acquaint the user with the true facts, and so that the dealers in turn would not be promising them delivery [167] when there was no hopes of making delivery.

Q. And you sent the same form letter to all of these persons?

A. Presumably so, unless it was something special that took a special letter.

Q. You sent the same letter to all the customers whose names were indicated?

A. I would presume so; I might also explain that, that on the orders as set forth in that bill, there is not all of them have the names of the users on them, by any means. I don't know how many—possibly twenty.

Q. May I have that, please?

Now this Exhibit H-H, which you say is typical of letters you sent to these persons—that is then for——

The Court: Is that your Exhibit 2?

(Testimony of D. Ray Hall.)

Mr. Carroll: I am referring now, if the Court please, to Defendant's Exhibit H-H.

The Court: Oh, pardon me.

Mr. Carroll: Which the witness says is typical of the letters sent to the persons who were ultimately to use the Gravely.

Q. You end up this way:

"Indeed, you have chosen wisely. And, you will again be wise in waiting until you can get a Gravely knowing full well that we will supply it just as soon as it is possible." [168]

* * *

Q. You did tell them in that letter that you would ship the Gravely as soon as possible, did you not?

A. That is mentioned in that paragraph. The paragraph above that there mentions another point which should be seen here, though.

Q. Well, did you not say to them in that letter——

A. You can't take one paragraph, when it is explained to by another paragraph and expect an answer.

Q. Would you let me finish the question, Mr. Witness, please? You did say to them in the closing paragraph of that letter [169] that you will ship their Gravely as soon as possible, did you not?

A. I said that, and I said in the other paragraph there——

The Court: Answer the question.

(Testimony of D. Ray Hall.)

A. Yes. May I explain as to what is explained in the other paragraph, what is explained in that?

The Court: If you want to explain, you can.

A. (Continuing): And it mentioned up here,

“And now, with a greater need than ever before for our equipment, our production is restricted. Also our agents have a great many unfilled orders accumulated from past years. So, we are not able to take care of all the orders placed with us.”

Q. That is your explanation now. Have you finished, Mr. Hall?

A. That is to answer your question, whether we promised him delivery.

Q. Now, in your other letter, which is Defendants' No. I-I, which your attorneys have introduced in evidence and which you say is the form letter you sent to all of these names that were sent to you, would you like to look at it? (Handing to witness.)

A. You might——

Q. I would like to ask you a question or two about it.

A. It is all right; I remember it.

Q. All right. And I will ask you if this second letter, if in this second letter, you did not say to your customers, [170]

“However, you can be certain that your order will be shipped just as soon as possible.”

Did you not say that?

(Testimony of D. Ray Hall.)

A. That's right, that's right, yes.

Q. And I ask you if you did not say to the persons to whom you sent these letters, being the persons who are named, whose names are indicated on these orders,

“In accepting your order, we call your attention to the facts which we list as follows:—”

and one of these is,

“The order is placed with the understanding that we will fill it as quickly as possible. We can not recognize any promised or implied time of delivery.”

Did you not tell that to the persons whose names are indicated on these orders?

A. Those form letters were sent to the persons that was possibly indicated on the orders. [171]

* * *

Q. (By Mr. Carroll): As a matter of fact, Mr. Hall, it is true, is it not, that you did accept all of these orders for delivery as soon as you were able to make them? A. That's right.

Q. You told the customers that, and you told your dealers that, did you not?

A. That's right, with the qualifications as pointed out in the rest of the letter.

Q. Now, in regard to the orders in suit here, which Mr. Graves placed with you, you never wrote to him that any of those orders were not accepted, did you?

(Testimony of D. Ray Hall.)

A. I don't recall any specific letter; we informed our dealers by bulletins and cards.

Q. You have gone over your correspondence with Mr. Graves quite carefully for this lawsuit, haven't you?

A. No, I haven't.

Q. You never wrote to him that the orders were rejected, did you?

A. I wouldn't have no memory.

Q. Now, if I can, so that you will be properly oriented, direct your attention to another matter, Mr. Hall: I thought you said something yesterday about your dealings with Mr. Graves' company being interrupted after Gravely Pacific was set up out here. [172] I didn't quite catch what you said, but you didn't mean to tell the Court that you yourself did not continue to deal directly with Mr. Graves after this subsidiary of yours was set up out here, did you?

A. I did mean that, but that would again have to be explained. It doesn't mean we haven't made direct shipments in this territory. Our relationship with the Gravely Pacific organization is as a distributor, and our other distributors and individual distributors, we used to have, was in the way of a contract. And that that contract provides that where a dealer buys his equipment directly from the factory, that the distributor receives a commission on that. So to the extent that we ship tractors in here during that time, that we shipped tractors, or in other territories, to dealers, we did; our relationship

(Testimony of D. Ray Hall.)

however, as to the contract, would not be with us, but with the distributors.

Q. All right. Now let me ask you the question: Tell the Court, please, whether, during 1945, after this subsidiary of yours was set up out here, you did or did not continue, yourself, to deal directly and personally with Mr. Graves?

A. To answer that question, what do you mean by "deal"?

Q. Did you not correspond directly with him during 1945?

A. And '46. Surely; we correspond with all our dealers.

Q. And you did, yourself, personally, with Mr. Graves, did you not? [173]

A. Possibly so; or maybe some official of the Gravely Motor Plow & Cultivator Company.

Q. You wrote to him that you were establishing a branch in Los Angeles, did you not?

A. I would have no recollection of the mention of a branch.

Q. Perhaps I could refresh your recollection.

I hand you here a letter, Mr. Hall, purporting to bear your signature on the letterhead of the Gravely Motor Plow & Cultivator Company, dated June 4, 1945. (Handing to witness.) Will you read that, please, or glance at it, and see if you can identify it?

A. Yes, that's right, that letter was sent.

Mr. Carroll: We ask that this be admitted in

(Testimony of D. Ray Hall.)

evidence, if the Court please, as Plaintiff's next in order.

Mr. Tenney: No objection.

The Court: It may be admitted as Exhibit No. 13, Plaintiff's No. 13.

(Letter referred to above, dated June 4, 1945, was then received in evidence as Plaintiff's Exhibit No. 13.)

Q. (By Mr. Carroll): In that letter did you not, yourself, personally write to Mr. Graves that you were setting up a branch in Southern California?

A. Didn't you read the letter, and didn't it say it is the equivalent of a branch?

Q. All right, the equivalent of a branch. Did you not write [174] personally and tell him you were setting up the equivalent of a branch?

A. At that time, at the time that letter was written——

Q. You personally wrote to him during this year, did you not, about what you allege you required in the way of a separate building for Gravelly?

A. I don't recollect of any letters of that type.

Q. Do you deny that?

A. I don't deny it. I say I don't recollect it.

Q. You don't mean that you haven't any recollection now of writing repeatedly to Mr. Graves about this matter?

A. I write a great many letters, and in 1945—that is three years back. I would have no recollection. If you want to call a particular one to my

(Testimony of D. Ray Hall.)

attention, I could tell you if I remember writing it.

Q. Let me ask you this: You don't deny that you dealt directly with this company during the year 1945 and the year 1946, do you?

A. I deny that; you will have to explain the word "deal." We had no contract with them.

Q. Did you not carry on business directly with this plaintiff company in 1945 and in 1946?

A. We——

Mr. Tenney: By "you," who do you mean? Will you make it fairer, counsel? [175]

Q. (By Mr. Carroll): I mean the gentleman on the stand and the Gravely Motor Plow & Cultivator Company.

Mr. Tenney: Well, the gentleman on the stand, if your Honor please, is president of two companies in this case, and I would like to have counsel——

The Court: Will you remove any doubt, if there is any, about that?

Mr. Carroll: All the letters, all of the correspondence, your Honor, is on the letterhead of the Gravely Motor Plow & Cultivator Company, one of the defendants in this action, of which this witness is the president, and he signs all of the letters as president.

The Court: Well, just frame your question, if you can, Mr. Carroll, to meet the suggestion.

Mr. Carroll: All right.

Q. Mr. Hall, did not you, as president of the Gravely Motor Plow & Cultivator Company, and

(Testimony of D. Ray Hall.)

did not the Gravely Motor Plow & Cultivator Company, have business dealings directly in regard to the dealership with Mr. Graves' company through 1945 and 1946?

A. If it was done so, it was done with——

Q. You can answer that yes or no, I think, and then explain it.

A. Might I ask a question there? What do you mean by "deals"?

The Court: You answer it yes or no if you can.

A. No, as far as our dealings were concerned, I qualified that [176] then by saying then that we possibly no doubt made statements to that territory. We wrote them as to things that should be done, but their distribution point was through our established distributor, the Gravely Pacific of California.

Q. Do you deny that you billed them directly?

A. No.

Q. You did bill them directly?

A. That's right, and gave commissions to the Gravely Pacific. [177]

* * *

Q. Now, if I may take you to another subject, please, Mr. Hall, there weren't very many of these tractors available during the war years, was there?

A. Yes.

Q. There were or there weren't?

A. We manufactured tractors. You mean of our make or one of the other makes?

Q. Your make.

(Testimony of D. Ray Hall.)

A. We manufactured our tractor continually throughout the war years. [186]

Q. But the supply was very limited?

A. Our records of sales, from memory, would show that we sold a greater number during the war period than we did previous to the war period.

Q. But the supply in relation to the demand upon the dealers was very limited, was it not?

A. That condition still exists.

Q. I am asking if it wasn't true during the war.

A. It is true during the war and it is true now.

Q. And your dealers all wanted more tractors than you could supply to them?

A. It is impossible to say that all wanted that. It would depend on the dealer. We haven't many dealers.

Q. But the plaintiff in this case wanted more tractors than you could supply to him?

A. At that time, yes.

Q. During the war—is that not true?

A. Yes, true.

Q. It was true in 1946 up to the time you attempted to terminate his services?

A. That is true.

Q. And of course he didn't get the tractors he wanted during the war, did he?

A. You are asking me as to how many he wanted. I don't know how many he wanted; he didn't get the tractors he ordered, no. [187]

Q. And he didn't get any others either, did he?

A. I—no.

(Testimony of D. Ray Hall.)

Q. And as a matter of fact, you were quite sure he could have sold many, many, many times the tractors you allocated to him, aren't you, during the war?

A. The answer would be my opinion—that would be that he could—just as automobile dealers could have, too.

Q. And now also during the war, Mr. Graves performed services for your company, did he not, the Gravely Motor Plow & Cultivator Company?

A. Mr. Graves—the answer would be “yes,” Mr. Graves continued to handle the product as a dealer without contract, and he performed services in this respect that had been out in use in that territory, and presumably he had sold them or anybody had sold—they were able to go to him to secure repairs, which he charged them for, and serviced the machines. There is no doubt of that.

Q. He services all of your Gravely tractors that came to him for servicing from Northern California during the war years?

A. I would presume he would have, since he made a profit on it.

Q. He investigated all the rather large number of prospects that you sent to him for investigation?

A. I am afraid that he didn't. In fact, it would have been an impossibility for any of our dealers to have investigated all prospects since during the war. [188]

(Testimony of D. Ray Hall.)

Q. You sent to him prospects continually during the war? A. Without a doubt.

Q. All during the war years, and you asked him to investigate, did you not?

A. Without a doubt.

Q. He took care of buy in advance orders for you that had gone directly to your factory, did he not?

A. That would be from memory—I don't recollect that he did or not. I do recollect that he wouldn't take buy in advance orders, which we take and recommend to be taken.

Q. I didn't ask you that. A. Pardon me.

Q. I asked you if he didn't take care of the buy in advance orders you had at the factory for Northern California Area?

A. My present recollection, I don't recollect of there being any such orders from Northern California.

Q. If there were any, he would have taken care of whatever installations were necessary when the tractor arrived, is that right?

A. That would be the assumption.

Q. He maintained parts out here, did he not?

A. That's right.

Q. All inquiries which you received during the war years in response to your national advertising, from Northern California, you sent out here to Mr. Graves' company for handling, did you [189] not?

A. That would be presumed to be correct, yes.

(Testimony of D. Ray Hall.)

Q. What do you mean that it would be presumed to be? You did, did you not?

A. I could say we sent all the inquiries out here. Our normal procedure would be, if we had any inquiries from any territory, we would refer them to the dealer.

Q. And that is what you did for the Northern California Area, is it not?

A. That is presumably so.

Q. And now, Mr. Hall, when you decided that you didn't need Mr. Graves any more at the end of the war, you then attempted to deprive him of the commission or profit on the orders he placed with you and which you have bound yourself to send, and which you have told the customers would be sent just as soon as conditions permitted?

A. We did——

Mr. Tenney: May I have that question, please?

The Court: Would you read that question back, Mr. Reporter?

(Record read.)

Mr. Tenney: I object to the form of the question, your Honor, as assuming something not in evidence.

The Court: The objection will be sustained.

Mr. Tenney: And it is complex.

Q. (Mr. Carroll): You did attempt to deprive Mr. Graves' [190] company of the commission on the orders he placed with you during the war?

A. We did not.

(Testimony of D. Ray Hall.)

Mr. Tenney: I object to that.

The Witness: Pardon me.

Mr. Tenney: The question has been answered, your Honor.

Q. (Mr. Carroll): You say you did not?

Mr. Tenney: I object to the question as being argumentative.

The Court: Well, he has already answered it. Let it stand. [191]

* * *

A. I wouldn't deny that he reported them to me.

Q. As a matter of fact, do you deny that you yourself, personally, wrote to Mr. Graves and told him that his agency was terminated?

A. I wouldn't deny that.

Q. Do you deny that you told him that he should tell the customers for whom he had orders that he no longer had the agency for your factory?

A. No, I wouldn't deny it.

Q. Then you don't deny that you told him that these customers should be given the opportunity of getting their order filled from some other dealer?

A. I don't remember the exact language; that would be the normal assumption, that he was told he couldn't receive tractors.

Q. Well, isn't it true that you sent this letter, which is your counsel's and your own Exhibit No. B-B? This is dated September 5, 1946, and it is on the stationery of the Gravely Motor Plow & Cultivator Company, addressed to D. E. Graves, and the H. V. Carter Company, Inc.:

(Testimony of D. Ray Hall.)

“Dear Mr. Graves:

“It is right that I should reply to your letter of August 30th addressed to the attention of Mr. [196] Thomas, for I so well recall my conversation with you back here when you visited us. I think I was quite plain in telling you what the Gravely Pacific or the Gravely Motor Plow either would require in case we would continue with you.”

You said that to him, didn't you?

A. That's right.

Q. And when you were talking about what either the Gravely Pacific or the Gravely Motor Plow would require in case “we would continue with you,” you were talking about the continuation of his agency for the Gravely Motor Plow & Cultivator Company, were you not? A. Yes.

Q. And did you not say this to him:

“As pointed out you had hold of too many competitive lines and that you could not expect us to continue unless you did certain things.”

When you said “us,” you meant the Gravely Motor Plow & Cultivator Company, did you not?

A. I meant that, and I must explain that, that the Gravely Motor Plow Company corresponds directly with the dealers, although there are contractual relations with the Gravely Pacific Incorporated, in this territory.

Q. “One of these was to put a separate store and organization on Gravely alone. You

(Testimony of D. Ray Hall.)

hedged on this, but finally [197] promised in an indirect letter that you would. Now Mr. Heinen reports that you had not done this and it was upon my suggestion that he notify you that you could not continue."

You did tell Mr. Heinen, did you not, to terminate the relationship?

A. That's right, that was discussed at our directors' meeting, and it was determined upon.

Q. Well, you told Mr. Heinen, did you not?

A. Yes.

* * *

A. That letter is addressed to H. V. Carter Company.

Q. And please tell us on whose stationery it is?

A. That is the Gravely Motor Plow & Cultivator Company.

Q. And you signed that letter as president of that company, did you not? A. That's right.

Q. You say nothing in this letter about acting as the president of the Gravely Pacific Company, do you?

A. No, that naturally would come from Los Angeles.

Q. Will you answer my question, please? [198]

A. Nothing said in that letter; but my letters to Gravely from Gravely Pacific will be from, addressed from, Hollywood.

Q. You wrote this letter as president of the parent company, the Gravely Motor Plow & Cultivator Company? A. That's right.

(Testimony of D. Ray Hall.)

Q. "I am sending a copy of this to Mr. Heinen and I am suggesting to him that he attempt to secure another dealer in that area."

You told Mr. Heinen that, did you?

A. That's right, and the Gravely Pacific had secured a very excellent dealer in his [199] location.

* * *

Cross-Examination

By Mr. Tenney:

Q. Mr. Hall, you were familiar with the order that was sent to Gravely Motor Plow & Cultivator Company in 1943 for thirty tractors?

A. Yes, yes.

Q. And that order is one of the orders that is in evidence here?

A. That's right.

Q. And that is one of the orders that makes up this alleged claim of 122?

A. That's right.

Q. Were there any names of any dealers or any purchasers that were sent to you by the dealer in connection with that order?

A. There was not.

Q. And in reference to the order for 45 tractors which was delivered to Gravely Pacific in July of 1945, that order was [202] subsequently received at the factory also, was it not?

A. Yes, it was. The date was 1946, instead of '45.

Q. Forty-six. I beg your pardon.

A. The reason I recall that is our looking at those exhibits there, and it shows that that order,

(Testimony of D. Ray Hall.)

while sent to the Gravely Pacific and dated July 3, that a copy was sent to us and received on September 6, if I recall, 1946, after the cancellation of the relationship with the Carter Company of the Carter Company with the Gravely Pacific.

Q. On August 23 of 1946?

A. The order was received in September.

Q. I am referring to the letter of Mr. Heinen, sent to Mr. Graves on August 23, 1946.

A. Yes.

Q. And in connection with that order, for the 45 tractors, which I believe would constitute a carload, were there any names of any purchasers that accompanied that order?

A. No, there was not.

Q. Now you stated in your cross-examination, I believe, Mr. Hall, that you recommended to Mr. Graves that on all orders that he could, that he received during the war, that he send the name of the prospective purchaser, is that right?

A. That's right, and if I may explain again, the reason for that was not in acceptance of the orders such as, so that we in turn as the manufacturers would protect our reputation, and try to [203] encourage the people who placed the order for tractors, so that they would wait until it would be possible to secure our particular make of tractor. And that those names were encouraged for that reason, and that the letters that have been referred to here as form mimeographed letters, which attempted to state those conditions.

(Testimony of D. Ray Hall.)

Q. Now, Mr. Hall, bearing in mind the order in July of 1946 and the order of 1943 that I have referred to, of 30 tractors and 45 tractors, how many would be the most orders that would have contained the names of the customers that are involved, or the claim as made by Mr. Graves in this case?

A. I am sorry. Will you restate that? I didn't quite understand it.

Q. Maybe my question isn't quite clear.

The order in 1943 for 30 tractors and the order in 1945 for 45 tractors, no names were sent for purchases?

A. That's right.

Q. And the total claimed orders in this case is 122, is that correct?

A. That's right, that's right.

Q. So that the most orders that you could have received the names of the prospective purchasers would be 47, is that correct?

A. That's right.

Q. And did you receive the names of the purchasers in all of those 47 orders? [204]

A. Why not nearly all of them. There is a certain percentage that had the county those were to go to instead of the name of the buyer.

Q. Now, counsel for the plaintiff, Mr. Hall, has referred to two of the exhibits in this case, Defendants' I-I, which as you recall, is the form letter?

A. Yes.

Q. And also that you testified that that is the form, that letter, that was sent to the prospective

(Testimony of D. Ray Hall.)

purchasers whose names were furnished you; is that correct (handing document to witness)?

A. That's right.

Q. And you are familiar with this?

A. That's right.

Q. And with the second page of it. I direct your attention to the portion of the second page which counsel has read, which reads as follows, and this is paragraph three:

“The order is placed with the understanding that we will fill it as quickly as possible. We can not recognize any promised or implied time of delivery.”

Now that notification was given to these prospective purchasers whose names were furnished you, is that correct? A. That's right, yes.

Q. I will also read paragraph one of this same page. That was paragraph three which I just directed your attention to. [205]

“Due to government restrictions, we can not guarantee delivery of the equipment on your order.”

That was also included in the notification that was sent to the prospective purchaser, is that correct? A. Yes, sir.

Mr. Carroll: Where is it you have just read, please?

Mr. Tenney: Paragraph one.

Mr. Carroll: Thank you.

Q. (Mr. Tenney): Now counsel has also re-

(Testimony of D. Ray Hall.)

ferred to Defendants' Exhibit H-H, and I will direct your attention to it again. It is a letter from Mr. Graves, addressed to the Gravely Motor Plow & Cultivator Company, dated January 10, 1944. Attached is a copy of a form letter which was sent to Mr. Dowler, whose name is on this order, that being one of the orders taking up a portion of the 122. You are familiar with that? (Handing to witness.) A. Yes.

Q. And in this document counsel read the last paragraph:

"Indeed you have chosen wisely. And, you will again be wise in waiting until you can get a Gravely knowing full well that we will supply it just as soon as it is possible."

You recall that was in this form notice that was sent out? A. That's right.

Q. I will also read to you, or direct your attention and read [206] to you, paragraph two of the letter:

"For twenty-one years the Gravely has been filling the needs of small power users throughout the entire world. Even in the midst of the depression there was a steady demand for the Gravely. For years our sales have been ahead of production. And now, with a greater need than ever before for our equipment, our production is restricted. Also our agents have a great many unfilled orders accumulated from past years. So, we are not able to take care of all the orders placed with us."

That was included in the notification that was

(Testimony of D. Ray Hall.)

sent to prospective purchasers whose names were furnished to you? A. That's right.

Q. And you say that those notifications were sent to less than 47 of the prospective purchasers whose orders were obtained by Mr. Graves?

A. That's right, yes, sir.

Q. At the commencement of the war, which started on December 7, 1941—during the year 1942—how much of your production was curtailed?

A. At the first limitation orders, as I recall, we were allowed to only build 26 per cent of our former sales for agricultural production. However, that same order stated in it that orders with a priority rating for government work for war purposes, our standard product, could be produced, providing first that [207] these orders were submitted to the War Production Board and a proper authorization given.

Q. And when did that change during the period of the war?

A. Well, that limitation order was amended and possibly a new one added, but throughout the war the farm machine industry operated under a limitation order and conditions would vary as to the percentage allowed to be built for agricultural purposes and some products were allowed to be built for war purposes.

Q. On a national scale, Mr. Hall, are you able to state to his Honor what percentage of the orders obtained by your dealers during the war proved to be authentic at the end of the war?

Mr. Carroll: We will object to this as incompe-

(Testimony of D. Ray Hall.)

tent, irrelevant, and immaterial, if the Court please, and having no bearing on the issues in this case; just what we are concerned about, I take it, your Honor, particularly in this case, may it please the Court, where these orders were to be shipped against sight draft, which gave the payment to this defendant directly when he put—for the full amount of his bill—directly when he put them on the freight cars in West Virginia. Now what has happened to other orders by some other dealers or other persons throughout the United States,—

The Court: The objection will be overruled. You may answer the question.

The Witness: Will you say that again, [208] please?

Mr. Carroll: Would you read the question?

(Record read.)

A. To explain that, I must first mention that we had different types of orders. First, orders that we are allowed to fill with a priority rating, why, we billed and delivered those during the war period to dealers that had secured those orders. Then the third type of orders that I mentioned, that we encouraged dealers to receive and report to us, why, we found that with few exceptions, dealers throughout the United States would secure a tremendous backlog of orders, and that all those orders after the war, as it developed, after the war was over and an attempt was made to deliver those, that there hasn't been of those particular orders, there

(Testimony of D. Ray Hall.)

hasn't been over 8 per cent of those that were bona fide orders, because every dealer would have a tremendous quantity of orders, because at that time everybody was looking for small tractors, and as far as going out and taking orders, it would be almost unlimited. And that that was why we attempted to get our dealers to comply with our policy of selling only orders that would be bona fide orders, by selling on our buy in advance plan, and by taking deposits on orders. After we would attempt to screen those orders to make sure those were bona fide orders, some of the orders that was of the type mentioned in this bill of complaint, it would be fortunate if there was even 8 per cent of those that would be bona fide orders, and of which [209] delivery was made. [210]

* * *

Q. I direct your attention, Mr. Hall, to Gravely bulletin—to all agents, which is Defendants' Exhibit No. D-D, dated June 10, 1945. In paragraph four of this bulletin, it reads as follows:

“It is our aim to take care of demands for Gravelys during 1946. To do this our production must be increased in a substantial way. Many details as to new plant, machinery and manpower are to be worked out. Details supplied later. It will be wise to start now booking orders (along lines we will later suggest) and reviewing ones already taken.” [211]

Is that one of the directions you sent out to dealers?

(Testimony of D. Ray Hall.)

A. That's right, and the date will give the date on that bulletin.

Q. That is June 10, 1945? A. 1945.

Q. Also in this bulletin that I just referred to, Mr. Hall, paragraph six reads as follows:

"A new plan for booking orders. Out of this increased production we hope to allot a known number of tractors to each agent. Then, a plan worked out on a national basis will be offered so that each agent can book orders, with deposits, for delivery during 1946. Old orders can be reinstated on forms first. This will include complete sales promotion to induce prospective buyers to wait for the Gravely a short while longer. Allotments to agents will be based on number of orders booked in this manner."

That was the information that was also sent to the dealers? A. That's right, the same date.

Q. I will ask you: To your knowledge, Mr. Hall, did Mr. Graves ever screen the orders that he would submit to you during the war?

Mr. Carroll: We will object to this as calling for the opinion and conclusion of this witness about what someone else did. [212]

The Court: The objection will be overruled.

A. Not to my knowledge.

Q. (By Mr. Tenney): Did Mr. Graves ever submit, to your knowledge, any orders with deposits? A. Not to my knowledge.

Q. Did Mr. Graves ever submit any buy in advance in orders? A. Not to my knowledge.

(Testimony of D. Ray Hall.)

Mr. Tenney: Excuse me, your Honor.

Q. (By Mr. Tenney): Did Mr. Graves ever submit any forms reinstating old orders obtained by him? A. Not to my knowledge.

Q. Mr. Hall, have you examined your records to find out how many tractors were sent by the factory to California during the years 1945 and '46?

A I have your letter on that question. I have it.

Q. And will you state to his Honor, please, how many tractors were sent to the distributor in California, which was the Gravely Pacific, in 1946?

A. 1946 was 164 tractors.

Q. And in 1945 how many? A. 40. [213]

* * *

Redirect Examination

By Mr. Carroll:

Q. Do you have in your records now, and can you find out for the Court, the number of tractors that you sent into California in [220] 1947?

A. In 1947 our shipments were to the Gravely Pacific. This shows it as 257.

Q. I am talking about the State of California.

A. And as far as any other shipments there, this record doesn't show. But my memory would be that there wouldn't be, except in some isolated cases, of a single shipment or so—it might be a buy in advance order or something like that.

Q. Do your records—you said you might be able to find something out from your records here; do your records that you have here enable you to tell

(Testimony of D. Ray Hall.)

his Honor how many tractors were shipped from your factory either through Gravely Pacific or otherwise into the State of California, for California?

A. They do not, except in the explanation I have made.

Q. I presume that Mr. Heinen's records will show that, will they? A. Possibly so.

Q. At all events, you did send Gravely Pacific 257 in 1947? A. That's right.

Mr. Carroll: 257?

The Witness: That's right.

Mr. Tenney: That's right.

Q. And you sent Gravely Pacific 126 in 1946?

A. 164.

Q. 164. And you are steadily increasing your production all [221] the time, and were then?

A. That's right.

Q. Will you tell his Honor how many of those 164 and 257 were sent to the plaintiff in this action?

A. My record doesn't show that.

Q. Now as a matter of fact, there is a big difference between these buy in advance orders and the type of order that Mr. Graves placed with you, is there not? A. That's right.

Q. A buy in advance order is an order that your factory sells directly out here, or an agent sells directly for your factory, and a contract is in the name of the factory with the man on the farm who wants to get the tractor?

A. That's right, that was——

(Testimony of D. Ray Hall.)

Q. It is a factory obligation?

A. That's right.

Q. It is an obligation of the Gravely Motor Plow & Cultivator Company?

A. That's right.

Q. And that is what you referred to as a "buy in advance" order? A. That's right.

Q. And as you have pointed out, none of the orders in suit here were orders of that character?

A. Not to my knowledge.

Q. The orders with which we are concerned here are orders which [222] the plaintiff in this action, the Carter Company, placed with you for delivery to the Carter Company, is that not true?

A. That is true.

Q. And those orders date back to 1943?

A. They date back to 1943, and if I may explain further, that the orders that the Carter Company placed at the beginning of '43 for 30 units, mentioned that that was at their 1943 and 1944 allotment, and that these other orders that was reported during that period of those times was to the Gravely Motor Plow Company's knowledge or their belief, simply a reaffirmation to the user that they was going to sell those machines to them, and hoped to sell to——

Q. The method of payment of these orders was entirely different, was it not? A. Yes, it was.

Q. In other words, on every order that you shipped to Mr. Graves, you drew against him just as soon as it got on the freight car?

(Testimony of D. Ray Hall.)

A. That could happen even on a buy in advance order, if the order was——

Q. Just a moment. Will you answer my question, please?

A. Yes. May I explain further, that on a buy in advance order——

The Court: Answer it first. Then you may explain it.

The Witness: Surely. May we start over? Could I have it read by the Reporter? [223]

The Court: Yes.

(Record read.)

Q. You weren't worried about the payment of any of those orders? A. No.

Q. They could never be delivered to Mr. Graves if the sight draft wasn't honored?

A. That's right.

Q. He couldn't get them until he paid you in full for them?

A. Our terms for twenty-five years have been solely for cash, with exceptions.

Q. Well, is it not correct in what I said, that any tractor you sent to Mr. Graves, he had to pay in full for it before he got it?

A. Yes, that's right—any dealer that buys from us.

Q. You had no worry of his accepting and paying for every order he placed with you?

A. That's right.

(Testimony of D. Ray Hall.)

Q. And you know perfectly well he could have sold every single tractor you sent him?

A. Well——

Q. Did you not?

A. In fact, unless he beat them off with a club during that period of years, he would have a difficult time to keep from selling them. [224]

Q. So as to every single one of these orders you received and acknowledged receiving from the plaintiff in this action, you would have been paid before they left the freight car? A. Yes, yes.

Q. Regardless of whether Mr. Graves had taken any deposit or not from the customer?

A. Yes.

Q. Now as a matter of fact, isn't it true also that it was left up to Mr. Graves how to distribute the tractors that he got?

A. Not entirely; it was left up to him as far as the agricultural orders that he would receive. On rated orders and on buy in advance orders, if any existed, it was our duty and responsibility to see that those were delivered to the particular customer called for.

Q. As a matter of fact, you didn't have but very few buy in advance orders in Northern California, did you?

A. From memory, I would say there is probably none.

Q. Negligible? A. That's right.

Q. So, therefore, how Mr. Graves distributed the

(Testimony of D. Ray Hall.)

tractors that he had ordered from you was his business, by and large, wasn't it?

A. Excepting the number of rated orders that were sent in that time. I don't remember the exact numbers.

Q. Well, apart from the rated orders. [225]

A. That were sent to him, and he distributed, presumably, to those people.

Q. Apart from the rated orders, was that not true? A. That's right.

* * *

Q. (Mr. Carroll): Apart from the rated orders and any preferred delivery orders, it was the responsibility of the plaintiff in this case to whom he should distribute the tractors that you sent him on his orders to you? A. That's right.

Q. Your contract with him as to all of these twenty-two orders was between your company and himself, not with the ultimate user to whom he might resell it? A. That's right.

Q. And when you say that there was no commission arrangement, you don't mean to tell his Honor that the commission or profit, [226] whatever you may call it, was not 30 per cent of the list price, the same as with all your other dealers?

A. As far as the commission arrangement, but don't overlook the fact that at that time the Carter Company was a dealer and in business for himself, and at that time he secured a discount.

Q. But did not the Carter Company have the

(Testimony of D. Ray Hall.)

same discount that all your other dealers all over the United States had, of 30 per cent?

A. That's right.

* * *

Q. Now as to each of those individual names, it was your custom and procedure to accept them and send them the form letters which had been identified in evidence here as H-H, and I-I? [227]

A. Yes.

Q. Is that not true? A. That's right.

Q. And in those letters you told them that you were accepting those orders, were you not, subject to delivery as soon as you could make it?

A. Subject to all the provisions and the conditions outlined there.

Q. And you told him: "In accepting your order, we call your attention to the facts which we list as follows:—"

That is true, isn't it?

A. In accepting the orders, that is a mimeographed order form. I mean, a mimeographed form, used in all of them, and the orders were not placed—in a few cases I would say with us, but the orders were placed with the dealer.

Q. Yes?

A. That was simply a notification of the fact that the order had been placed.

Q. Well, whose order were you accepting?

A. As far as accepting the order of any of them, we wasn't accepting any of them, as far as accepting an order.

(Testimony of D. Ray Hall.)

Q. Do you mean to say when you wrote this to the person whose name you had been given as one who was to receive a tractor ordered from you by the plaintiff in this case, that when you said "in accepting your order," you weren't accepting [228] any order?

A. If that was an order, as sent by a dealer, as in this case, to us, our form there used on that would not have been proper. The order was never placed directly with us, it was with the dealer.

Q. Didn't you tell us that you sent the letter, the same letters, to all of the people placing orders?

A. That's right.

Q. And in the letter you sent to each of these people whose names Mr. Graves sent to you, you said, "The order is placed with the understanding that we will fill it as quickly as possible. We can not recognize any promised or implied time of delivery." And later on, you say, "Every effort will be made to get it to you as quickly as possible."

You accepted those orders that Mr. Graves sent you with the intention of fulfilling them as soon as possible afterwards, did you not?

A. We didn't accept the orders, excepting as I have qualified this. We hoped to furnish tractors to dealers after the war and as we are, and which we have issued bulletins explaining the conditions as to how we attempted to allocate our production, our increased production, according to the way that that dealer in turn would follow out our policies and do things which we knew was for the benefit of them,

(Testimony of D. Ray Hall.)

and for ourselves; and as to the amount of activity, the manpower, facilities, [229] service facilities, and so many things that goes into judging as to whether a dealer is effective or not. Those type of dealers that did that do receive larger allotments.

Q. You accepted these orders for delivery after the war, did you not, or during the war if conditions permitted?

Mr. Tenney: If your Honor please, I am going to object to that question as calling for the conclusion of the witness. I think——

The Court: The objection is overruled.

A. When you use the word,——

Q. (By Mr. Carroll): I think you can answer that question directly, yes or not.

A. State the question again.

Mr. Tenney: Then explain, if you want.

The Witness: State the question again.

The Court: Would you read that back, Mr. Reporter?

(Record read.)

A. Yes, with this explanation: That as far as accepting the order is concerned, it is doubtful in my mind if the orders were accepted. We encouraged the placing of orders by all of our dealers, and we tried to notify the customers in turn as to the conditions existed. We had put out bulletins, printed letters on that, so that the ultimate users in turn would know that there was no implied delivery, no promised delivery, or whatnot. And as far as accepting the order is concerned, it [230] is impossible to say

(Testimony of D. Ray Hall.)

whether we accepted the orders, concerning which we notified them as to conditions of the order that had been placed with the dealers.

Q. Now if I may direct your attention to the other class of order here, the order for the 25 tractors and the 45, those would have been shipped the same way, would they not? You would have gotten your payments for them before they got off the car?

A. That's right.

Q. So that regardless of any deposit, you had no risk whatsoever, as far as getting your pay?

A. No.

Q. Now as far as this—withdraw that, please.

You never told the plaintiff in this action that you wouldn't fill those orders?

A. I don't recollect any more than the evidence has brought out.

Q. You never notified them the orders were not accepted?

A. We never. I don't recall any specific notifications excepting as I have pointed out before; our notification to our whole organization was through bulletins, which he presumably received.

Q. You never wrote to Mr. Graves, or the plaintiff in this action, that these orders would not be filled?

A. I don't recall. [231]

Q. As a matter of fact, you told him, or your organization has told him, that on occasion he may expect the D tractors that he had ordered from you?

A. Possibly so. [232]

(Testimony of D. Ray Hall.)

Recross-Examination

By Mr. Tenney:

Q. Mr. Hall, the tractors involved in this action are of two types, isn't that correct?

A. That's right.

Q. And what are those types?

A. We refer to them as our Model D tractor and Model L tractor. The Model D tractor is one that we manufactured for much longer. We previously manufactured it beginning back about 1928.

Q. And when, Mr. Hall, if you will tell the Court, please, did you last manufacture—that is by “last manufactured” I mean the factory at Dunbar—when did you last manufacture D tractors?

A. About the best of my recollection, we discontinued the manufacture of the D Model right around the war years, starting in [236] 1942, due to the fact that the amount of material we could secure was limited, and we had to choose. We felt it was better to take the material to manufacture one model.

Q. Which is the larger tractor, the D or the L?

A. The Model L.

Q. And you say that you discontinued, to the best of your recollection, the manufacture of the Model D around 1942, is that correct?

A. That's correct, and we have not since that time manufactured that model at all, nor we do not manufacture it today. However, this particular model is manufactured by a different company that we own some stock in, in England.

(Testimony of D. Ray Hall.)

Q. At the present time, and since the discontinuance of the manufacture of the Model D at Dunbar, the only place that the Model D is manufactured is in England, is that correct?

A. That's correct, excepting, I might make this amendment to my other statement; as to the fact that there possibly would have been some surplus parts left over from the Model D, that those might have been assembled. That is a small, limited quantity assembled during the war years.

Q. After the discontinuance of the manufacture mainly of the D tractors that you have testified to?

A. That's right.

Q. There may have been a few that have been manufactured here?

A. That is possible. [237]

Q. Otherwise, the only place, as I understand your testimony—and correct me if I am wrong, Mr. Hall—is in England, is that right?

A. That's right, yes.

Q. Direct your attention, Mr. Hall, if you will, to Defendants' Exhibit No. F-F. That refers, does it not to 25 D tractors?

(Handing to witness.)

A. That's correct.

Q. And what is the date of that order that was received from Carter Company?

A. June 28, 1943.

Q. And that includes 25 Model D's and 5 Model L's?

A. That's right.

(Testimony of D. Ray Hall.)

Q. In addition to those 25 Model D's, are there other Model D's making up this number of 122?

A. That's right. I believe there was a total of four more Model D's on that bill.

Q. In addition to that? A. That's right.

Q. Making a total of 29 Model D's?

A. That's right.

Q. Mr. Hall, will you state to the Court, please, how many Model D's you have received, and by that I mean the Gravely Motor Plow & Cultivator Company or any of your distributors; how many Model D's have been received since the end of the [238] war?

A. We have received a total of 25 Model D's, to the best of my recollection, which was received in the year 1947.

Q. And those were received from England?

A. That's right.

Q. And how many of those Model D tractors, Mr. Hall, to your knowledge, have been delivered in California?

A. We attempted to distribute those over the various sections of the country, and to the best of my recollection, it was three sent to the Gravely Pacific, Inc.

Q. Mr. Hall, I will ask you, if this offer which you received or the order which you received, dated June 28, 1943, from H. V. Carter Company, was ever accepted by you?

A. It was definitely not, because at that time we

(Testimony of D. Ray Hall.)

couldn't accept orders with the uncertainties that existed.

Q. And I will direct your attention to your reply, which has already been called to the Court's attention, or your knowledge, rather. A. Yes.

Q. Mr. Hall, this appears to be dated July 1, 1943, and the last paragraph of this reply reads as follows:

"But at any rate, we would appreciate the order, and will hold it until such a time as we can see what we can do in the way of shipping. I am not at all sure that we could get that much equipment, but I would like [239] to offer for our discussion that both of us keep in mind of shipping you a full carload of tractors for possibly late this year. This would save us both considerable expense."

To what did you have reference when you said "ship a full carload later this year"?

A. What I had in mind at that time, to my recollection, is that at that time nobody knew as to what the conditions might prevail during the year. There might be possibilities of getting material, more than what we anticipated. We might be able to build more tractors.

Q. And what happened as an actual fact?

A. As an actual fact, the situation became increasingly difficult. It was increasingly difficult to operate throughout the war period, because materials became scarcer, and the restriction orders, the limitation orders, became better understood. It

(Testimony of D. Ray Hall.)

plainly showed that you would only manufacture a limited quantity for certain purposes.

Q. Well, did you actually produce more or less tractors? A. I beg your pardon?

Q. Did you actually produce more or less tractors thereafter?

A. Well, as far as the war years are concerned, we pretty well had an even keel. In other words, we were able to secure enough of rated orders with priority ratings to maintain our normal [240] production.

Q. So your production during the war years was just about the same, was it?

A. Our actual production was, but of course we was directed by the War Production Board on those types of orders. They had to be shipped specifically to where they originated.

Q. Now, Mr. Hall, I want to direct your attention to the order for 45 tractors, which was sent by the Carter Company to you and to the Gravely Pacific, in July of 1946. Did you ever accept that order? A. I did not. [241]

* * *

Q. (By Mr. Tenney): Now, Mr. Hall, I understood you on cross-examination by counsel to say—and correct me if I am wrong and misquoting you—that Mr. Graves and the Carter Company were in no different situation than anyone else, that they would have to beat the customers off during the war with a club, is that correct?

(Testimony of D. Ray Hall.)

A. That is absolutely correct. Conditions were like that throughout the world.

Q. And was Mr. Graves and the Carter Company in any different situation than other dealers throughout the country? A. None at all.

Q. And was the backlog of orders that Mr. Graves had any different than the backlog of orders held by dealers in other sections of the [243] country?

A. I would say it was different in that they were not nearly so large as they was in most sections of the country where we had active representation.

Mr. Tenney: That is all, Mr. Hall.

Further Redirect Examination

By Mr. Carroll:

Q. Mr. Hall, if you had fulfilled the orders which Mr. Graves had placed with you, there is no question in your mind that he would have sold every one of those, is there? A. Surely.

Q. What is your answer?

A. Surely, if he could have got them at that particular time, it would be very much questionable if he could fill them, if he got them, say, now, because those orders were dated back in the war years, and as I have mentioned, we would be very fortunate from our records and my recollection—it would be a deal very fortunate if he would be able to fill even 8 per cent of those orders after other material became available.

(Testimony of D. Ray Hall.)

Q. Have you not testified that the demand for Gravely tractors was just as great in '46 as it was previously? A. That's right.

Q. Was it not just as great in '47?

A. Possibly to a lesser degree, but to some degree.

Q. And you know perfectly, don't you, that if you had shipped the tractors which Mr. Graves ordered from you after the war, in [244] '46 or '47, which you would have been paid for in full the moment you shipped, there is no question but that he would have sold them, is that right?

A. That's right.

Q. That is true, is it not? A. That's right.

Q. And the profit which he would have made on those tractors was 30 per cent of the list price?

A. Yes, sir.

Q. And you have testified that it was your practice to demand payment in full for these tractors as soon as you loaded them on the freight cars?

A. That is our customary terms.

Q. So that you, yourself, would have had no worry about the payment for these tractors that Mr. Graves ordered from you?

A. That's true. In fact, any place we would have sent tractors, it would have been the same way.

Q. Now, then, you produced just as many tractors during the war as you did prior to the war, is that not right? A. Approximately so.

Q. As a matter of fact, you produced more during the war?

(Testimony of D. Ray Hall.)

A. I don't have the figures before me. From recollection, I would say approximately so.

Q. Well, didn't you produce more?

A. I don't recollect. [245]

Q. You can't tell his Honor whether you produced more or less during the war?

A. I can't recollect. I say we produced approximately the same as the previous war year.

Q. Now, then, about these Model D tractors, you are still including Model D tractors in all the price lists that you send out, are you not?

A. That is true.

Q. You included them in all your listings, you included Model D tractors, as late as 1946, after the war?

A. That's right, we were optimists. We hoped to have them.

Q. And as a matter of fact, in a letter which you identified for me this morning as coming from the secretary of your corporation in August of 1945, you said to Mr. Graves and the plaintiff in this action:

"We will do our very best on the tractors, especially the one you mentioned. However, as yet there is no definite promise as to when we will have them. We are expecting to manufacture considerable number of them yet this year and then we can furnish you with whatever is needed from that production."

You still repeat your testimony to the Court that you discontinued manufacturing these in 1942?

(Testimony of D. Ray Hall.)

A. That's right, that letter says we expect [246] to manufacture.

Q. And you still repeat your testimony to him?

A. That's right.

Q. Now as a matter of fact, the Model L tractors is an improved model, is it not?

A. It is a question of opinion. It is a newer model.

Q. Well, that is the reason you discontinued the D and manufacture the L, is that it is a better model; isn't that so? A. No, no, sir.

Q. It is a later and more efficient model?

A. I wouldn't say it is a later model; it is a later model, the L is. Not a more efficient model for the purpose.

Q. At all events, it is the model you are concentrating on?

A. No, not at present. The D tractor is being produced in England, and now we have been assured of supplies of those.

Q. Well, the L model is the model that you are concentrating on in this country?

A. That is on production.

Q. And it has been so in 1946 and '47 and also '45? A. It has been for some years.

Q. And any orders which you have for these tractors, you fill with an L if you can't get the D, don't you?

A. Not necessarily so. If it is an order for a D, where the D is adapted for it, the customer would not accept an L. The D is designed for a different purpose than the L.

(Testimony of D. Ray Hall.)

Q. Did you finish? [247] A. Yes.

Q. Is it not true that you customarily and regularly fill orders for D tractors which were taken during the war with the L tractors now?

A. No.

Q. Is it not true that particularly in California, the L tractor is acceptable in the place of the D tractor for any type of work?

A. It is not true at all. There is conditions in California definitely—in fact California is our biggest state for the sale of the D model tractor.

Q. Now, then, in this letter which your attorney has read to you in regard to the 25 Model D tractors, and your response to it, you did not tell Mr. Carter you would not accept his order, did you, the Carter Company?

A. The intention of that letter was the fact that we couldn't accept the order from Mr. Graves or the Carter Company.

Q. Will you point out to me any place in this letter where you say, "we won't accept this order"?

(Handing to witness.)

A. That exact language, no.

Q. Will you point out any place in it——

A. "I am not at all sure we could get that equipment. At any rate, we appreciate the order and will hold until such time as we can see what we can do in the way of shipment."

I didn't say that—— [248]

(Testimony of D. Ray Hall.)

Q. Just a moment. You didn't say in that letter that you had rejected the order, did you?

The Court: What exhibit is that, Mr. Carroll?

Mr. Carroll: I am sorry, your Honor, this is Exhibit No. F-F.

Q. As a matter of fact, instead of rejecting this order, saying you didn't accept it, didn't you say to the plaintiff in this action that your first thought on looking at his order was that he should have an equal number of L tractors, an equal of D tractors?

A. That is mentioned in the letter.

Q. That is what you said to him, wasn't it?

A. That's right.

Q. And didn't you also say to him, instead of saying that you wouldn't ship on the order, didn't you say to him, "But I would like to offer for your suggestion that both of us keep in mind of shipping you a full carload of tractors for possibly late this year," and that is in 1943?

A. That is said in the letter with the hope that more tractors would be available.

Q. That is what you said to him about this order, isn't it?

A. That's right.

Q. And that is what you call not accepting the order?

A. That's right, the order was not accepted.

Q. Now you said something about not accepting the order that [249] was given to you in 1946 for 45 tractors. You said something about the restrictions. As a matter of fact, the restrictions that had applied

(Testimony of D. Ray Hall.)

during the war were largely lifted before that order was placed with you, is that not true?

A. That's right, that is true.

Q. Now will you please tell his Honor whether, on receipt of either one of these orders, you ever wrote to the plaintiff in this case that you would not fill them? A. I do not recollect.

Q. Will you tell the Court, please, whether you ever wrote to the plaintiff and who submitted these orders to you in which you received and acknowledged—did you ever write that you would reject the orders? A. I don't recollect.

Q. As a matter of fact, you have no single, solitary letter as any of these orders that ever informed the plaintiff in this case, whom you were urging to solicit orders, that you would not deliver these orders?

A. I don't recollect any particular letter to that effect; our bulletins covered those particular subjects.

Q. Despite that, you had a rather extensive and voluminous correspondence all during this time with the plaintiff company?

A. I wouldn't say that; we had correspondence.

Q. You had correspondence with him during all during this period, did you not? [250]

A. We had correspondence with the plaintiff.

* * *

JOHN W. HEINEN

recalled on behalf of the plaintiff; previously sworn.

The Clerk: The witness on the stand is John W. Heinen, previously sworn.

Direct Examination

By Mr. Carroll:

Q. Mr. Heinen, you sell tractors direct [251] to the ultimate consumer, do you not?

A. That is true.

Q. And you have been doing that through '45, '46, and '47? A. Right.

Q. And your company, which is in turn owned by the defendant Gravely Motor Plow & Tractor Company, receives the 30 per cent list price on the products—the discount? A. Which company?

Q. Your company.

A. We receive a discount, yes.

Q. Then you received the discount which would have gone to Mr. Graves' company; for instance, if you had sent the tractors to him? A. Yes, sir.

Q. That is true, is it not? A. Yes.

Q. Now will you tell us, please, how many tractors you distributed, your company, in California, in 1945?

A. I think I have those figures here. Forty.

Q. And how many did your company distribute or sell in 1946? A. 164.

Q. 164. That is in the State of California.

A. Not only in the State of California.

Q. Well, how many did you?

(Testimony of John W. Heinen.)

A. But in the five adjacent states also. [252]

Q. How many did you distribute in the State of California in 1946?

A. That is a difficult thing to say, without referring to our sales record.

Q. Have you your sales record with you?

A. No.

Q. Where did you get the memorandum you are refreshing your recollection with?

A. These are figures that were procured from the Gravely Motor Plow & Cultivator Company's books. Mr. Hall supplied me with these figures. They took them off their records.

Q. In other words, the figures you are now testifying from are the figures Mr. Hall gave you which he in turn got from the secretary of the defendant Gravely Motor Plow & Cultivator Company in West Virginia?

A. I presume so.

Q. And how many did you distribute in 1947?

A. 267.

Q. 267. And on each of those that you distributed yourself, directly, to the customer, you received the 30 per cent discount from the list price?

A. We received a discount, yes. A little different than that, but we received a discount.

Q. As a matter of fact, you got a 40 per cent discount, didn't you? [253]

A. That's right.

Q. You get 10 per cent more than Mr. Graves' company would have gotten had you sent these tractors to him for distribution on his unfilled orders?

(Testimony of John W. Heinen.)

A. As a distributor, we are allowed 40 per [254] cent.

* * *

Q. And in regard to every one of the tractors that you sold, instead of sending them out on the orders of the plaintiff in this case to the plaintiff, on every one of those orders your company made a 40 per cent discount? A. That's correct.

Q. Which otherwise would have been made by the plaintiff in this case?

A. Correct. The plaintiff wouldn't have made 40 per cent, but only——

Q. The plaintiff would have made only 30 per cent?

A. That's right; 10 per cent override for us.

Q. In other words, instead of getting 10 per cent override on which you might have sent to the plaintiff in this case, you got 40 per cent by filling the order yourself?

A. Correct. Any orders fulfilled or filled from our office, we get 40 per cent.

Mr. Carroll: That is all, Mr. Heinen. [261]

* * *

Cross-Examination

By Mr. Tenney:

Q. Now as a matter of fact, Mr. Heinen, have you examined your records to see how many orders were filled by you after August 23, 1946, which were duplications of the orders which were submitted to you by the Carter Company prior to August 23, 1946?

(Testimony of John W. Heinen.)

A. Yes, our records indicate there were two—one of which Mr. Graves himself requested us to fill. It was a Veterans Administration order, and Mr. Graves happened to have it on file, and he asked us if we wouldn't make a special effort to fill this order, and that he, Mr. Graves, of course, expected no commission. This all took place, naturally, after our relations were severed with Mr. Graves.

Q. And what was the other?

A. The other, I remember very clearly, is a Mr. Graff, up [262] in this territory, who had an order on file and sent us a letter; if I recall clearly, I believe that was the situation. This letter begged us for a tractor, which we build. I understand that that was one of Mr. Carter's or Mr. Graves' old [263] orders.

* * *

Mr. Tenney: If your Honor please, I might read the correspondence in connection with this matter. It commences with a letter of January 10, 1947, and the last documents is a letter from H. V. Carter Company, addressed to Gravelly Motor Plow & Cultivator Company:

“Gentlemen:—”

Mr. Carroll: Just a moment. You don't mean the correspondence commences with this letter?

Mr. Tenney: I said the exhibit commences with the last letter.

Mr. Carroll: I thought you stated—

Mr. Tenney: (Reading)

“On April 30, 1945, we placed our order No.

(Testimony of John W. Heinen.)

27842 with you for a Gravely Model L tractor with tool holder complete, rotary plow and cycle bar attachment for Mr. V. Graff, 627 Eighteenth Avenue, San Francisco, California, this to be shipped to us for delivery by us to Mr. Graff.

“Yesterday, this gentleman called in and stated he had received the tractor from you in response to his letter to you. He wanted instructions as to setting up and operating the equipment, in which we gave him the necessary service.

“Now comes the question as to our commission for this [265] sale, as Mr. Graff states he has paid you in full for it.

“Very truly yours,

H. V. CARTER COMPANY,
INC.

By D. E. GRAVES.”

Q. Now did you pay H. V. Carter Company any commission on this transaction? A. No.

Q. Did you request them to set up the equipment, or give the instructions in connection with the setting up of the tractor? A. No.

Q. Now is it your best recollection that the two transactions that you have testified to are the only ones that your records disclose of orders obtained by H. V. Carter Company that were filled after August 23, 1946? A. Yes.

Mr. Tenney: That is all.

(Testimony of John W. Heinen.)

Redirect Examination

By Mr. Carroll:

Q. Did you ever answer Mr. Carter's or Mr. Graves' letter?

A. Not that I can recollect.

Q. Well, why didn't you?

A. I don't believe I did. I can't recollect of ever having.

The Court: I can't hear your answer.

The Witness: I can't recollect of ever [266] having answered it.

Q. (By Mr. Carroll): Where did this correspondence come from?

A. What portion of the correspondence there?

Q. Well, where did any or all of it come from?

A. Well, part of that, I think, came to us from the factory. In fact, that is about the only way that we would have gotten any notification.

Q. Well, can you look at these papers and tell me when you first got them? (Handing to witness.)

A. Yes, I certainly can.

Q. Or maybe I can shorten it up. Did you get them just before this trial?

A. If you don't mind, I will answer that in just a moment. I can tell you in a moment. (Examining file.) Yes, we received this from the secretary of the Gravely Motor Plow & Cultivator Company on October 4, 1946.

Q. All of this correspondence?

(Testimony of John W. Heinen.)

A. The fact that there was an order to be filled for Mr. Graff.

Q. When did you receive the rest of the correspondence that your attorney has put in evidence? There are some original letters there to you, or copies of them there.

A. January 15, 1947, from the secretary of the Gravely Motor Plow & Cultivator Company.

Q. Well, let me ask you this: When did you first see this batch of correspondence before you testified here this [267] afternoon, in its present form? You have seen this before you testified, have you not?

A. This is from a file that we have.

Q. Well, did you assemble this?

A. That is what I am trying to get at. No, no.

Q. Who did assemble it?

A. Well, I presume that this order, the original order here, came from Dunbar. That is a Dunbar stamp.

Q. Well, where did you get it?

A. We have never received it.

Q. Where did you get it from?

A. I have just received it now.

Q. Have you seen it before?

A. I have seen a portion of this before.

Q. You mean you have never seen this batch of correspondence together before you testified here to this Court? A. I don't believe I have.

Q. You didn't see it before you took the stand this afternoon? A. In this form, no.

Q. Now you say you got this order from the fac-

(Testimony of John W. Heinen.)

tory on October 4, 1946? A. That's correct.

Q. Is that correct?

A. Yes. Is that the letter from the secretary?

Q. Yes. [268] A. To us? To me?

Q. Yes. A. That's right.

Q. And here is what the secretary—that is, Mr. Thomas—the secretary of the Gravely Motor Plow & Cultivator Company said to you: (reading)

“Dear Mr. Heinen:

“Here is a letter which we received today from one of Carter's customers. I know that you will want to *take of* this for him.

Yours sincerely,”

Q. You never wrote to Mr. Carter about this?

A. Are you asking me a question, sir?

Q. There was a question mark at the end of that. At least, there was meant to be.

A. From our file, apparently not.

Q. You went ahead and filled it without any reference to him at all whatsoever, did you not?

A. There was no necessity of referring it to him. It was long after this contract was voided that we made any effort.

Q. Pardon?

A. To fulfill that, to fulfill that order.

Q. And even though the plaintiff in this action, at the request of the customer who bought this from you, serviced this tractor and gave him instructions on how to operate it, and wrote to [269] you about the commission or wrote to the Gravely Motor Plow

(Testimony of John W. Heinen.)

& Cultivator Company, you never even bothered to answer the letter?

A. Who serviced the tractor?

Q. The plaintiff in this action.

A. Well, I am sorry to disagree with you there.

Q. Well, here is a letter addressed to the Gravely Motor Plow & Cultivator Company dated January 10, signed by Mr. Graves. This letter was in turn referred out to you by your principal, Mr. Hall, was it not?

A. That is something I can't tell, correspondence.

Q. Well, it was referred out to you by Mr. Thomas, the secretary of the Gravely Company?

A. That's correct, I would say.

Q. All right, now, here is a letter from Mr. Carter which you apparently didn't hear while your attorney read it:(reading)

“Gentlemen:

“On April 30, 1945, we placed our order No. 27842——”

This is the letter from Mr. Graves, now.

A. Yes.

Q. (continuing)

“——with you for a Gravely Model L tractor with tool holder complete, rotary plow and cycle bar attachment for Mr. V. Graff, 627 Eighteenth Avenue, San Francisco, [270] California, this to be shipped to us for delivery by us to Mr. Graff.

“Yesterday, this gentleman called in and

(Testimony of John W. Heinen.)

stated he had received the tractor from you in response to his letter to you. He wanted instructions as to setting up and operating the equipment, in which we gave him the necessary service.

“Now comes the question as to our commission for this sale, as Mr. Graff states he has paid you in full for it.”

Now you never even bothered to answer that letter, did you?

A. There was no necessity of answering a letter of that type, inasmuch as the Carter Company had nothing whatsoever to do with the filling of that order. We filled that order.

Q. It was Mr. Graves' order, was it not?

A. No, it was not at the time we filled it, it was our order.

Q. Isn't that order Mr. Graves' order (indicating)?

A. In 1945?

Q. Is that not Mr. Graves' order?

A. That he made the sale.

Q. You knew it was Mr. Carter's order when you got this from the Gravely Motor Plow & Cultivator Company?

A. Why certainly.

Q. They told you that? [271]

A. That's right. [272]

* * *

Mr. Carroll: That is our case, your Honor; the plaintiff rests.

The Court: We will take a recess now for about ten minutes.

(Short recess.)

The Court: The court will come to order.

Mr. Tenney: At this time, if the Court please, we would like to move the Court under Rule 41b for a dismissal of this action on the grounds stated in 41b. I do not know whether your Honor desires to hear argument on the motion.

The Court: Why under 41b? It is under 41b, is it?

Mr. Tenney: Yes, sir.

The Court: I will deny it without prejudice, and upon the consideration of the entire case, reconsider it.

Mr. Tenney: Very well, your Honor; thank you.

We will call Mr. Hall as the first witness, and at this time may I ask your Honor's permission that my associate, Mr. Clifford, examine Mr. Hall in connection with the motion we made at the start of the trial?

The Court: Yes, sir.

Mr. Tenney: To quash service of summons?

The Court: Yes, sir.

You have no objection to that, Mr. Carroll, have you?

Mr. Carroll: None at all, your Honor. [284]

D. RAY HALL

recalled on behalf of defendants; previously sworn.

Direct Examination

By Mr. Clifford:

Q. Mr. Hall, what is your position with the Gravely Motor Plow & Cultivator Company?

A. I am president of that organization.

Q. And how long have you been president of that organization?

A. I have been president since 1936.

Q. And what is your position with the Gravely Pacific Company?

A. I am also president of that corporation as well.

Q. And how long have you been president of that corporation?

A. Since its inception in 1944.

Q. And are you familiar with the internal workings of both organizations? A. Yes.

Q. Who is the auditor for the Gravely Motor Plow & Cultivator Company?

A. Our auditor for the Gravely Motor Plow & Cultivator Company is Mr. R. C. P. Waicher, a C.P.A. of Charleston, West Virginia.

Q. And where do you keep your books and accounts and reports of the cultivator corporation?

A. In Dunbar, West Virginia.

Q. And where is your office for that corporation?

A. In Dunbar, West Virginia.

Q. And where is the office of the Gravely Pacific, Incorporated? [285]

(Testimony of D. Ray Hall.)

A. It is in California, in Los Angeles, California.

Q. And is the Gravely Motor Plow & Cultivator Company qualified to do business in the State of California?

A. It is not, nor has ever been.

Q. Is the Gravely Pacific, Incorporated, qualified to do business?

A. In the State of California, it is.

Q. Is there an agent for service of process designated for the Gravely Pacific, Incorporated, in the State of California?

A. There is. I am not sure whether it is the secretary of the state or the auditor that we have, but one *of* the other. I mean the independent C.P.A. auditor.

Q. And where are the books and records of account of the Gravely Pacific, Incorporated, kept?

A. They are kept in Los Angeles.

Q. And who is the auditor for Gravely Pacific, Incorporated?

A. A Mr. George Brun. I believe it is in Pasadena, his home address.

Q. And who is the managing director of the Gravely Pacific, Incorporated?

A. Well, I had better answer that question and explain. While all of the affiliated corporations with the Gravely Motor Plow & Cultivator Company have caused to be formed, that the plan of action on that was to—they are West Virginia corporations; that is, incorporated in West Virginia, and then qualified to [286] do business in the particular

(Testimony of D. Ray Hall.)

section of the country in which they located. And that to supervise those activities, Mr. Edward Heiner—he maintains an office in South Charleston, West Virginia, and his duties is to supervise all of those corporations as managing director, is the title we give him.

Q. And orders for the service and sales policy of the different corporations are issued out of his office?

A. That's right, they are formulated by the directors' meetings that we have, in which, in turn, he attends of course, and then our policies are formulated in that manner, and he transmits them to the organizations out in the field.

Q. Why were these twenty-one corporations formed?

A. Well, our purpose in forming those was in no way at all to interfere with our normal way of selling, except to this point: We found that individual distributors—when I say “distributors,” they are the ones that get a much higher discount, they have 40 per cent as at present, and the dealer outlet, as we call it, is 30 per cent. Now they were formed primarily with the very thought in mind of attempting to decentralize each area of the United States, and so that in turn, that the affairs of that company, as it has to do with selling and servicing of our product, could be better taken care of. We also found that the policy of individual distributors establishing branches, branch offices, or anything of that sort, were not as adaptable as this particular

(Testimony of D. Ray Hall.)

type of plan, because if [287] another distributor sells your line, we have no control as to whether he might sell competitive lines, or whether he might discontinue selling the line completely. Whereas a corporation, it goes on. In other words, a manager of a corporation may change, but that corporation has their facilities, trucks, service facilities and whatnot, so that they perpetuate themselves. It is a very good business reason for that.

Q. When the Gravely Pacific was organized, did it cause the removal of its previous distributor outlets in California?

A. As far as distributor outlets, it naturally replaced the distributor outlets, but that particular time in California, that the main thing there, that is, and as our bulletins pointed out, the formulation of these companies did in no way have anything to with the dealers. The dealers couldn't—they continued as they had in the past, but their relations then were made directly with this corporation.

Q. Was it formed with the intention of removing any dealers in California?

A. Not at all, because our policy is still to sell and to sell through dealer outlets, because we find that our product is one that must not only be sold, but must be serviced, too, and that is the purpose of this corporation, is in no way or sense of the word to secure an undue amount of profit. In the first place, this distributing agency that replaced or replaces individuals, in most cases, on distributing,

(Testimony of D. Ray Hall.)

it didn't replace [288] dealers, nor did not affect their sales in any way.

Q. And at the present time, you not only have Gravely Pacific as a distributor, but you also have dealers located in the State of California?

A. That is true, and the policy of the Gravely Pacific is to continue to expand those facilities for selling through dealers. As a good illustration, we never were able to secure the right type of dealer representation in northern California. Now by the fact that the Gravely Pacific is a separate organization there and is able to keep in closer touch with this territory, they have been able to establish a dealer now that is perfectly satisfactory—is performing in a much more satisfactory manner. He is able to carry out things that we have found over twenty-six years of experience is very vital to the success of selling and distributing our product.

Q. Were the other dealers, the dealers that you mentioned prior to the inception of the Gravely Pacific, required to perform sales and repair services? A. Yes.

Q. At that time? A. Yes.

Q. Are the activities of the dealers in California substantially the same now at this time as they were prior to the inception of the Gravely Pacific? [289]

A. They are; their functions are identical.

Q. And has it been the policy of Gravely Pacific to pay commissions on sales made in the territories of the dealers since the inception of Gravely Pacific?

(Testimony of D. Ray Hall.)

A. If those are dealers—I mean, if that is in a territory where they have an active dealer that is working, certainly they would pay commissions to that dealer on anything that they might in turn deliver in that territory.

Q. Coming back to the internal operations of both corporations, how does your plan—well, for example, when you receive an inquiry, when you personally receive an inquiry as president of both corporations, receive an inquiry directly from the field from some dealer in California, do you respond to that letter, that inquiry?

A. If we receive a matter pertaining to—and I am not referring to just the normal course of a retail inquiry or a correspondence in for folders, but I am talking about anything that happens in that territory where it is a matter for Gravely Pacific to decide—it naturally is a matter that is referred to our office in Los Angeles, the office of the Gravely Pacific, for them to direct their correspondence from there.

Q. Well, if you were to respond to a direct reply, on what stationery would you answer that letter?

A. That would be—a lot would depend on the nature of the reply. But, for instance, in a dealer, like the H. V. Carter [290] Company, that we had known for years and which they have customarily wrote us often, out of politeness I would naturally reply to that on Gravely Motor Plow & Cultivator letterhead. That would be my normal procedure,

(Testimony of D. Ray Hall.)

instead of just referring it directly to the corporation in Los Angeles.

Q. Are you familiar with the preparation of the income tax returns for the various corporations?

A. That is true, that I am, because I might explain it in this way: That in the formation of these corporations, there was a decided question there as to whether, if there was a close enough tieup on these corporations, their income tax returns would have to be consolidated with the Gravely Company. That matter has come up and not too far back, and has been decided through the Collector of Internal Revenue at Huntington, West Virginia, that there was a legitimate business purpose, and these were separate corporations, and they allowed them to make their tax returns separately, and instead of with the Gravely Motor Plow & Cultivator Company, although, Gravely Company does own the majority of stock in each corporation.

Q. You have stated that the Gravely Pacific was organized in 1944?

A. That's right.

Q. That was the time when the excess profits tax was still in effect?

A. That's right. They went in effect in the year 1945, as well, [291] which would make the question of even greater vital importance for those years, and our income tax was returned separately, which is a further indication that they are entirely separate corporations as far as their legitimate offices are concerned. [292]

(Testimony of D. Ray Hall.)

Q. (By Mr. Tenney): Mr. Hall, you have already testified with respect to the order received from Mr. Graves of the Carter Company for the 45 tractors in July of 1946? A. That's right.

Q. And you have testified that that order was not accepted by you? A. That's right.

Q. And by "you" I mean the factory; did you ever acknowledge that order to the Carter Company?

A. I am not sure—to my knowledge, that is.

Q. Mr. Hall, I will ask you, was Gravely Motor Plow & Cultivator Company, at the time of the receipt of that order, in a position to fill it?

A. No.

Q. Why?

A. Due to the fact that there is still scarcity of material. Our production capacity was not so large. Now I might also explain that further by saying that——

Mr. Carroll: Just a moment, your Honor; I think the witness has answered the question.

The Court: Well, he can explain it if he wants to.

A. (Continuing): That in 1946, the first part of the year, particularly the three-quarters of the early part of the year, they were extremely difficult in securing material and [294] manufacturing. Our much heavier sales were not in effect until the very latter part of 1946, and any increase in sales shown in 1946 over '45 was in the latter part.

Q. And directing your attention again, Mr. Hall,

(Testimony of D. Ray Hall.)

to the order of 1943 for the 30 tractors, 25 of which were D tractors, you testified that that order was not accepted by the factory? A. That's right.

Q. And were you in a position at the time of the receipt of that order to fill it?

A. Definitely not.

Q. Were you ever in a position up to the present time to fill that order with respect to the D tractor?

A. That's right, we are not.

Q. Up to the present time?

A. That's right.

Q. And those two orders you have already told his Honor were lump orders?

A. That's right.

Q. You never received any specific names for any customers or purchasers of Carter Company with respect to any of the tractors included in those orders, is that correct? A. That is right.

Q. And as to the remaining 47 orders, 4 of those, Mr. Hall, I believe you testified were also D tractors? A. That's right. [295]

Q. You received those orders—when you received those orders—were you in a position to deliver them? A. No, we were not.

Q. Are you in a position now to deliver them?

A. No.

Q. Have you been since the time of the receipt of the orders, in a position to deliver them?

A. We have not.

Q. And that brings us down to 43 orders, Mr.

(Testimony of D. Ray Hall.)

Hall, and those orders, as shown by the bill of particulars in this case, were for L tractors?

A. Yes, sir.

Q. Did you ever accept any of those orders?

A. We did not.

Q. And at the time of the receipt of those orders, were you in a position to fill them?

A. We were not.

Q. Now, Mr. Hall, there has been some mention made of a visit that Mr. Graves made back to the factory, I believe, in October of 1945?

A. Yes, I recall.

Q. Is your recollection correct, that that was the time that Mr. Graves came back there?

A. Yes, that's right.

Q. Did you see him at that time? [296]

A. Yes, I did.

Q. And will you state to his Honor, please, first, when did this conversation take place, to the best of your recollection, and who was present?

A. As I recollect, it was in October of 1945. I would not remember the exact date, and as far as other people being present, Mr. Graves—I wouldn't recall anybody else being present excepting Kenneth Thomas, the secretary of our company. We have an adjoining office, and we probably was together part of the time on that.

Q. But you had a meeting at that time, anyway—you personally? A. That's right.

Q. With Mr. Graves? A. That's right.

Q. Will you please state to the Court, Mr. Hall,

(Testimony of D. Ray Hall.)

your best recollection as to the substance of what the conversation was that took place between you and Mr. Graves at the time he was back there?

A. In the first place, this had been worked up to by correspondence. Mr. Graves was wanting to come to the factory with the idea in mind of discussing with us the possibilities of continuing to selling Gravelly tractors. At that time, as we had intimated, the fact that on the contract we had had previously, in the years 1940 to 1942, there was certain things we required. [297]

Mr. Carroll: If your Honor please, I would just like to interrupt the witness at this point. I dislike interrupting, but I gather the witness had said something about something he had intimated previously.

The Court: I think the question calls for the substance of the conversation.

Mr. Tenney: That is correct, your Honor.

The Witness: I will answer it differently, pardon me.

A. (Continuing): The substance of the conversation was the fact that Mr. Graves now wanted, through the Carter Company, to sell many more—that is, to sell our tractors—and to receive our tractors from him. My reply to that was a restatement of the fact as to what had transpired in these previous years, and the fact that he had always sold competing lines and hadn't given our, the type of representation that our tractor merited. That I also mentioned, and I also mentioned the fact that we

(Testimony of D. Ray Hall.)

often had letters from users saying that Mr. Graves had tried to sell different machines.

Q. (By Mr. Tenney): Is this the correspondence that took place between you?

A. That's right, as I recollect it, and it was due to a number of factors like that that we were—that we did not encourage Mr. Graves that we would allow him to continue to sell. Mr. Graves wanted to know what he could do to secure, to continue with the agency, and at that time I cited to him the fact that [298] the main thing that we required would be that he provide a suitable manpower, so that our product would be given the proper type of demonstration work, and that he also be cooperative in the new distributing point that we were planning to establish, or that we had established in California. And the third thing I have mentioned was the fact that in order to do this, that he should provide facilities so that our product would not be confined entirely with competing lines, and that was the basis that we operated, as far as our other dealers are concerned. That was the gist of the conversation, as far as Mr. Graves was concerned, as far as the fact mentioned. Mr. Graves mentioned, "Well, if I do this and provide a building, how many tractors, or what tractors will I receive?" He was not promised one single solitary thing. I think his testimony on that is very accurate as to what I told him, that he would not—we could not guarantee one single solitary tractor, because our policy—my policy—as I explained to him, over the uncertain

(Testimony of D. Ray Hall.)

years, we never have, we haven't any delivery promises to any dealer. We don't make delivery promises as to things that are too uncertain—have been for those——

Q. (By Mr. Tenney): Were the orders that Mr. Graves had at that time, and by that I mean the orders where you had received the names of the prospective purchasers, were those discussed? [299]

A. They were discussed—if they were discussed, they were discussed in the light of the fact that he would like to receive tractors in order to fill those particular orders, and I mentioned with no intention as to any segregation, that he would need new orders in order to justify the expense of the business. Mr. Graves knew he would not get any tractors at all unless some suitable facilities were supplied to service our product.

Mr. Carroll: I ask that that be stricken out as the opinion and conclusion of the witness as to another man's state of mind.

The Court: That part may go out.

Mr. Tenney: Very well, your Honor.

Q. (By Mr. Tenney): Did you tell Mr. Graves anything with respect to when, if at all, there would be delivery on the orders that I have just referred to?

A. No, Mr. Graves was informed at that time of the fact that it was—I am absolutely uncertain as to when any delivery promises were made, any delivery could be made. In fact, well, as I explained

(Testimony of D. Ray Hall.)

to Mr. Graves at that time, and as subsequent bulletins brings out, the tractors that we could build them, they would be allocated to the dealers that would give us the proper type of representation, and that he had not in the past ever did that.

Q. Did you or did you not have any discussion with Mr. Graves [300] at that time with respect to screening orders and getting deposits?

A. Yes, definitely we do.

Q. Will you state to his Honor what that was, giving the conversation as best you can recall it?

A. The best as I recall it, was the fact that as we pointed out, and as we pointed out to all our dealers, that I might be talking to, the very fact that it is so easy during those periods of inflation and war to secure so many orders that would be duplicated with any number of other people that would handle different competing machines. We did not consider those orders of any value at all until it developed that they would really take delivery when they would be available, because with our production as it is, on small tractors, we knew, and as I informed him at that time, that would be absolutely impossible for us to produce the number of tractors that the dealers intimated that they had on order and wanted. [301]

* * *

(Testimony of D. Ray Hall.)

Cross-Examination

By Mr. Carroll:

Q. Now you have testified about your ability to fill these orders. Tell the Court, if you will, please, how much your production in '46 increased over your '45 production. A. I don't recall.

The Court: The record is here.

Q. Well, what is your best recollection?

A. The year '46 or '45?

Q. Yes.

A. As I explained before, the increase was all in the latter part of the year, the greater part of it. I would estimate possibly 25 per cent or something like that. [304]

Q. Twenty-five per cent increase in '46 over '45?

A. That's right.

Q. What was the percentage increase in '47 over '45? A. I wouldn't recollect.

Q. As a matter of fact, weren't your sales in 1945 about \$973,000? A. I don't recollect.

Q. What is your best recollection?

A. I wouldn't attempt to recollect on the thing, or maybe you would put the figures up to me and next, say I am wrong. I wouldn't attempt to estimate.

Q. Weren't your sales in 1946, as against the 1945 figure of \$973,000, weren't your sales in '46, \$1,775,000?

A. I don't recollect the exact figures of our sales. I will say this, that our sales have increased, natu-

(Testimony of D. Ray Hall.)

rally—'46 over '45, '47 over '46, and '48 over '47.

Q. And can you give his Honor an estimate of the increase of your sales of '47 over '45?

A. I wouldn't attempt to; it would be confusing. We have made some increase of sales.

Q. Let me ask you if these figures are not approximately correct, that your sales in 1945 were \$973,000 and that your sales in 1947 were \$3,790,000?

A. I don't remember as to the exact division on those.

Q. Well, was it two or three million last [305] year?

A. Our sales of last year, of 1947?

Q. Yes.

A. My recollection would be again—I hesitate to make an estimate—you are so easily confused. Our sales in 1947, my estimate would be two million and a half.

Q. You mean it was not three million?

A. I don't remember—somewhere between two million and a half and three million would be closer to the figure.

Q. Might it have been three and a half million?

A. It might have been anything. I am just giving you my estimate.

Q. The Dun & Bradstreet, though, shows \$3,790,000. Is that \$3,790,000, would that be correct?

A. How many?

Q. Would that be \$3,790,000?

A. You can draw your own conclusion, I think. I would assume possibly it would be.

(Testimony of D. Ray Hall.)

Q. That is approximately correct, isn't it?

A. Yes.

Q. And that is against sales in 1945, of \$973,000?

A. The figure of \$973,000 sounds quite wrong. I think our sales were much higher than that, that year.

Q. If the Dun & Bradstreet report shows that, do you think that was an approximate figure?

A. I don't think that is right, because we haven't filed our [306] reports with Dun & Bradstreet on all years.

Q. With your—strike that. Were your sales approximately a million dollars in '45?

A. My estimate would be that it would be higher than a million dollars.

Q. How much higher?

A. This is purely an estimate; I would say somewhere around a million and a half to two million.

Q. So that the difference, you think, is between a million, or a million and a half, to three million seven hundred and ninety thousand in '46?

A. That's right.

Q. Now at all events, Mr. Hall, you were in a position in 1946 and '47, and '48, to send 474 tractors to your subsidiary here and to Mr. Seavey, correct?

A. We was in a position. You are reciting the figures that were sent. That answers itself. Yes, we sent those.

Q. As a matter of fact, you sent more than that;

(Testimony of D. Ray Hall.)

those are only the figures that they have sold here themselves. Do you know how many tractors you sent out here to Gravely in 1948?

A. You mean the Gravely Pacific?

Q. Yes.

A. I do not know. I have no figures with me on that figure.

Q. Mr. Heinen repeated some figures that he got from the data [307] you gave him. Don't you have the data, too?

Mr. Tenney: I had this data this morning. This is yours.

A. Is that mine? I think—I don't think that has the '48 sales. This doesn't have the '48 sales on it; this is only for '45, '46, and '47.

Q. Have you got it some place else? Mr. Heinen said he got it from you.

A. No, you asked Mr. Heinen for the other dates. On the '48 sales, we don't have that. But the principal thing, if I may comment further, that there is no depending on the fact that our sales have increased each of those years, and also, I want to also make a comment on that same question, that as we have explained and explained to Mr. Graves when he was there, the allocation of these sales is going to be an allotment, and was going to the dealers who would furnish us, or give us, the right type of representation.

Q. Well, Mr. Heinen has testified on the basis of the figures you gave him, that you sent him 164 tractors in 1946, that you sent him 267 tractors in

(Testimony of D. Ray Hall.)

'47. Did you send him at least an equal number in 1948?

A. I would say we probably did. It would be my estimate that we did. I would like to also qualify that statement and make this assertion, that on the sales that we made, and to that, the Gravely Pacific in this territory, that they were made to [308] dealers with the same discount, who was receiving identically the same discount as the H. V. Carter Company, and with all of them. And if the H. V. Carter Company would give us the right type of representation, why in the world would we want to receive another dealer, or deviate from the Carter Company and give them the reasonable opportunity to do what we gave the Carter Company a reasonable chance to do?

Q. Have you finished now? A. Yes.

Q. Now to get back to these figures, you sent 164 out here in '46, you sent 267 in '47, and you say you sent at least an equal number in 1948, to the Gravely Pacific, correct?

A. 1948 is not over, by any means, yet, but I would say we sent at approximately the same ratio.

Q. Well, assuming you have sent approximately the same—and this is the end of November and you are sending more now, aren't you, than you sent them in '47?

A. I wouldn't say that from memory. I will say we sent them approximately the same, because——

Q. Well, assuming——

(Testimony of D. Ray Hall.)

A. May I continue and complete my statement there, please?

Q. Yes.

A. The same, for this very reason, that—and which has a bearing on the case; these orders that we speak of as taken back in these other times, tractors were in much, much, much [309] greater demand than they are today. These orders that we have, as I pointed out, it was only a small——

The Court: Are you smoking in the court room?
(To spectator.)

Mr. Carroll: May the witness continue, your Honor?

The Court: Yes.

A. (Continuing): I have forgotten what I was saying. I am through.

Q. (By Mr. Carroll): Well, now, if you will permit me for just one moment, Mr. Hall, assuming—give or take—a few either way, that you sent approximately the same number in this year that you sent in '47, that means that in '46, '47, and '48, you have sent Gravely Pacific 728 tractors, correct?

A. That's correct. [310]

* * *

Q. (By Mr. Carroll): What I am saying to you is this: You have sent tractors to Mr. Seavey, who didn't start with you here before February of 1947, all of Mr. Graves' orders, and the orders of the plaintiff in this case—they had been all placed with you prior to July of 1946, is that not true?

A. That is true.

(Testimony of D. Ray Hall.)

Q. And is it not true that—When did the Gravely Company commence to operate in California?

A. The Gravely Company as a corporation has never operated in [312] California.

Mr. Tenney: Which Gravely?

Q. (By Mr. Carroll): When did the Gravely Pacific Company, your subsidiary, commence to operate? A. In 1944, the end of 1944.

Q. And did they open up—when did they open up their office? A. In 1944—or '45.

Q. What month? A. I wouldn't recall.

Q. Is it not true that the great bulk of the orders that you took and received from the plaintiff in this case were in your hands before Gravely ever started to operate? A. That is true.

Q. But you have been able to supply them, though? A. That is not true.

Q. You have supplied them; you don't deny that, do you?

A. They have more orders than they could fill. In this period, I mean as far as '46 was concerned, and '45, they were just in the same position, exactly, as you mentioned. They had more orders than they could fill, or think of filling, taking them.

Q. And you don't deny that you had sent them tractors for delivery which they themselves had personally sold since they started business in 1945 in that amount approximating between three and four hundred? A. Surely. [313]

Q. Orders taken subsequent to the taking of the

(Testimony of D. Ray Hall.)

great bulk of the orders which you received from the plaintiff in this case? You don't deny that?

A. I deny the fact as far as the orders—you refer to them as orders, and as to the conditions existing in '47 and '48, I deny that there was any of those orders as of today.

Q. You never once sent a notice of cancellation of any of the orders you received from the plaintiff in this case? A. I don't recall.

Q. You never told them, or sent them a letter, saying that you wouldn't fill them?

A. I don't recall; it would only be natural not to recall those things. We certainly wouldn't discourage a man not to wait until he could get our product.

Q. Now isn't the real reason you are not honoring any of these orders, isn't that that you think you have found a better dealer?

A. The real reason we are not honoring those orders is the fact that the dealer that we attempted, and gave the chance and opportunity to do what we thought he should, completely and miserably failed to do that.

Q. Then that is the reason you are not honoring the orders, isn't it?

A. The orders from the Carter Company?

Q. Yes. [314] A. That is true.

Q. You allowed him to proceed all through the war, to take orders, you received the orders, and you kept him on during the war allowing him to service all your equipment, and as you have just

(Testimony of D. Ray Hall.)

testified, the reason you are not completing the orders and allowing him his profit on it is because you think you have found someone who will do his work better, is that not true?

A. That is not true. We found someone that is doing the work better, but the reason we did not go ahead with him and furnish the machines is the fact, as I have stated, that he in turn would not do what was reasonably businesslike, in a business-like manner, in getting himself to the point where he could rightfully take care of these. At the same time, all through this period of time, we had more orders in other sections of the country than we could produce. It was up to us to determine as to what section of the country to put those tractors in. It is natural, when we decide what the territory will be to allocate these in, the quality of the representation in the market and things of that kind has to be taken into consideration.

Q. And that is the reason you authorized, told Mr. Heinen, to cancel his contract at the end of the war, in '46?

A. The reason that I authorized or approved, is the fact that Gravely Pacific cancelled his contract—that was because of [315] the fact that he failed, first—he did not have a man available to put on our tractor as he promised verbally to me that he would do. Second, he was not cooperative, in that he didn't attempt to reinstate the orders that he had here, so he could make sure that they were bona fide orders, because our allotment was made on the number of

(Testimony of D. Ray Hall.)

actual orders that a dealer had at that time. And the third thing is the fact that he didn't supply suitable facilities for handling our product, because his facilities which had been redecorated, he sells any number of competing lines, and that was the thing that we did not allow.

Q. And that is the real reason you are not honoring his orders? A. I stated the real reason.

Q. You were not worried about the payment—you know very well that they will pay for them?

A. Yes.

Q. So that that is the real reason?

A. He would have paid for them at that time, I'll wager.

Mr. Carroll: If your Honor please, I ask that the witness' wagers be excluded.

The Witness: Excuse me?

Q. (By Mr. Carroll): Now let me ask you this: You say you had a conversation with Mr. Graves in October of 1945, is that right?

A. That's right. [316]

Q. You discussed all these matters with him?

A. That's right.

Q. Gravely Pacific Company was operating out here?

A. That's right. I discussed those matters with him, both as president of the Gravely Pacific, Incorporated, and before that, of the Gravely Motor Plow & Cultivator Company.

Q. You have two hats, Mr. Hall?

A. I have quite a number.

(Testimony of D. Ray Hall.)

Q. At all events, you did not carry on all these discussions with him at the various times in which this subsidiary of yours was operating?

A. That's right, me and my associates.

Q. Well, I thought you said you were alone at the conversation?

A. I could still talk with him at various times. He talked with Mr. Thomas, Mr. Heinen.

Q. Well, were your conversations with him alone, as you have testified? A. I would assume so.

Q. I think you said that the books of account of the Gravely Company were kept out here in California? A. That's right.

Q. Also the corporate books?

A. That's right.

Q. And they are in charge of Mr. Heinen, I assume?

A. Well, a certain amount of them are in charge of the accountant. [317]

Q. Well, where are the books kept?

A. The books of account—I mean by that, they are kept—the records—they are kept, the corporate records and things of that sort, they are kept at the accountant's.

Q. The books of account, which are the operating books of the company? A. That's right.

Q. They are in Mr. Heinen's charge, are they not? A. That's right.

Q. You hired Mr. Heinen?

A. That's right.

(Testimony of D. Ray Hall.)

Q. You are in constant corerspondence with him?
A. In constant correspondence?

Q. Yes.

A. I explained before, if you want me to go into it again, I can show you how we handle——

Q. I think you can answer it yes or no. Are you?

A. I am not in constant correspondence.

Q. Are you in regular correspondence with Mr. Heinen about the affairs of your company?

A. I get letters from Mr. Heinen about that, and at the same time, he sends weekly and monthly regular reports to Mr. Ed Heinen.

Q. Now, are you not the president of some of your other subsidiary companies, Mr. Hall? [318]

A. That's right.

Q. And how many of the others are you president of?

A. There is twenty-one, I believe; I mean, twenty-one altogether. That would make twenty others.

Q. So you are president of the parent company and you are president of each of the subsidiaries?

A. That's right.

Q. And the other officers of Gravely Pacific, I think you said, were Sybil Hall?

A. That's right.

Q. She is your wife? A. That's right.

Q. And the other officers of this subsidiary corporation are officers of the parent corporation, the Gravely Motor Plow & Cultivator Company?

A. I testified on that yesterday. I don't recollect

(Testimony of D. Ray Hall.)

exactly as to it—whatever my testimony showed.

Q. Well, Mr. Thomas holds office in both companies?
A. Yes.

Q. The secretary of the parent company is also secretary—he has a corresponding office in the subsidiary, does he not?

A. No, not by any way, shape or form.

Q. Well, what is his office?

A. Did I testify yesterday that Mr. H. E. Thompson was secretary of the Gravely Pacific? [319]

Q. All right, what is Mr. Thomas' position?

A. Mr. Thompson.

Q. Mr. Thomas?

A. Thomas—what is his position? With the——

Q. Gravely Pacific.

A. With the Gravely Pacific, I would almost have to get my notes.

Q. You don't remember?

A. I don't remember. Whatever I testified yesterday.

Q. As a matter of fact, you pretty much run all these corporations, don't you?

A. I wouldn't say that at all; I would be pretty well scattered out all over the country if I did it all myself. I am responsible for each one, I am the head of each one as the president, yes.

Q. You are responsible for the subsidiary corporation here, and also for the parent corporation?

A. I am responsible in the point of view that it is a corporation that I am president of. [320]

JOHN WILLIAM HEINEN

recalled as a witness on behalf of defendant; previously sworn.

Examination

By Mr. Tenney:

* * *

We also made it very plain to Mr. Graves that the orders that he contended he had on file as far as we were concerned were no orders whatsoever, that the orders were required from him must be filed with us, that any of this he might have on hand he must screen, he must go out and verify. He must go out either in personal contact, or by telephone, or by letter, and, of course, we were, as I explained to Mr. Graves——

The Court: When did you do that, if you knew that the Carter Company would pay cash on delivery, or cash F.O.B.? Wasn't that a screen order? Didn't you know they would pay when it was delivered?

The Witness: Your Honor, the reason we did that was this: It had been the experience through our own organization that some leads that we had received from the factory which were purported to be actual orders were no orders whatsoever.

The Court: How could you say that and how would you be concerned if you had a certain number of orders and [356] knew, for instance, if you delivered you would get your money. What more were you after than your money?

The Witness: We were concerned with actual orders, not just a vague assurance.

(Testimony of John William Heinen.)

The Court: Didn't you consider that an order from people who had paid consistently when that product was delivered on a freight car? [357]

* * *

Cross-Examination

By Mr. Carroll:

Q. Isn't it a fact you were deliberately using this company during the war to get all the service you could out of them, and then at the end of the war you deliberately terminated them to make the profits on these tractors in your own company?

A. No.

Q. Do you believe Mr. Graves to be an ethical business man?

A. Yes, I do.

Q. And his company one of high business integrity?

A. I do.

Q. You have never known them to have canceled an order which they have placed with your company?

A. No.

Q. You know nothing, certainly, of their canceling an order in their twenty years' business relationship with your factory before you came into the picture?

A. No, I would have no reason to know anything about that.

Q. You have told his Honor you were worried about having a [369] cancellation of orders. Did you ever ship a single one of the 122 tractors that this plaintiff had ordered, to see if they would cancel them?

A. No.

(Testimony of John William Heinen.)

Q. Did you ever offer their 122 tractors to see if they wanted them? A. No.

Q. In fact, you sold them, yourself?

A. We sold tractors retail and wholesale.

Q. This \$13,000 profit that would have gone to the company that represented you all throughout these years and during the war years went to Gravely Pacific, and later on to the dealer that you appointed in 1947 up here?

A. That is a difficult question to answer; but if I say yes it would take many qualifications. [370]

* * *

Mr. Tenney: Defendants rest.

Mr. Carroll: Plaintiff has no further evidence to offer, your Honor.

Mr. Tenney: At this time we would like to renew our motion to quash service of summons on the Gravely Motor Plow & Cultivator Company.

The Court: I think, Counsel, that matter would best be presented on briefs.

[Endorsed]: Filed December 24, 1948. [371]

[Title of Court of Appeals and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal, as designated by the parties, to wit:

Record on Removal

Contains Copies of

Order for Removal

Affidavit of Service

Notice of Filing of Petition and Bond for
Removal to the United States District Court,
Northern District of California, Southern
Division

Notice of Order for Removal

Order for Removal

Petition for Removal of Cause to the United
States District Court, Northern District of
California, Southern Division

Notice of Filing of Petition and Bond for Re-
moval to the United States District Court,
Northern District of California, Southern
Division

Complaint for Damages (Breach of Contract)

Exhibit "A" (Bond)

Record on Removal (Certificate to preceding papers)

Notice of Motion of Defendant Gravely Motor Plow and Cultivator Company, a corporation, to Quash Service of Summons and to Dismiss Suit as to Said Defendant and Affidavit of D. Ray Hall (Exhibit "A") and Affidavit of John W. Heinen (Exhibit "B")

Affidavit of D. E. Graves in Opposition to Motion of Gravely Motor Plow and Cultivator Company to Quash Service of Summons, etc., and Exhibits "A," "B," "C" and "D."

Affidavit of Edwin F. Hiner

Affidavit of D. Ray Hall and attached 6 pages of photostats

Affidavit of D. E. Graves—Supplemental

Affidavit of Pearl G. Smith

Order

Bill of Particulars

Answer of Defendant Gravely-Pacific, Inc.

Dismissal as to Defendant Gravely Motor Plow & Tractor Co., Inc.

Second Amended Answer of Defendant

Decision, Findings of Fact and Conclusions of Law

Judgment

Notice of Motion for a New Trial and to Alter or Amend Judgment

Decision, Findings of Fact and Conclusions of Law

Judgment

Notice of Motion to Alter, Amend and Make Ad-

ditional Findings of Fact and Conclusions of Law and to Amend Judgment Accordingly. Attached is Proposed Additional, Altered and Amended Findings of Fact (unsigned)

Notice of Motion to Amend the Findings of Fact by Making an Additional Finding of Fact, Pursuant to Rule 52(b) of the Federal Rules of Civil Procedure

Motion in Opposition to Plaintiff's Motion to Amend Findings of Fact by Making an Additional Finding of Fact

Plaintiff's Objections to Defendants' Motion to Alter, Amend and Make Additional Findings of Fact and Conclusions of Law and to Amend Judgment Accordingly

Notice of Appeal to Court of Appeals

Cost Bond on Appeal

Appellant's Designation of Record on Appeal

Order on Motion of Defendants to Alter, Amend and Make Additional Findings of Fact and Conclusions of Law and to Amend Judgment Accordingly

Order on Plaintiff's Motion to Amend the Findings of Fact by Making an Additional Finding of Fact

Appellee's Designation of Additional Portions of the Record, Proceedings and Evidence to be Included in the Record on Appeal

Appellee's Amended Designation of Additional Portions of the Record, Proceedings and Evidence to Be Included in the Record on Appeal

Order Extending Time to Docket

Reporter's Transcript for November 22, 1948; November 23, 1948; November 24, 1948, and November 25, 1948

Reporter's Transcript for June 9, 1947

Plaintiff's Exhibits: Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16

Defendants' Exhibits: Nos. A, B, C, D, E, F, G, H, I, J, K, L, M, M¹, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, and NN

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 27th day of January, A. D. 1951.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12844. United States Court of Appeals for the Ninth Circuit. Gravely Motor Plow and Cultivator Company, a Corporation, Appellant, vs. H. V. Carter Co., Inc., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 29, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12844

GRAVELY MOTOR PLOW AND CULTIVATOR
COMPANY, a Corporation, et al.,
Appellants.

vs.

H. V. CARTER CO., INC.,
Appellee,

STATEMENT OF POINTS UPON WHICH
DEFENDANT - APPELLANT GRAVELY
MOTOR PLOW AND CULTIVATOR COM-
PANY INTENDS TO RELY ON APPEAL

The points upon which Defendant-Appellant Gravelly Motor Plow and Cultivator Company intends to rely on appeal are as follows:

1. The court erred in its Order dated June 20, 1947, denying defendant's motion to quash service of summons and to dismiss suit as to defendant.
2. The trial court, by its Decision, Findings of Fact and Conclusions of Law, dated March 10, 1950, erred in annulling its previous Judgment entered July 27, 1949, and its Order contained in its Decision, Findings of Fact and Conclusions of Law dated June 22, 1949, wherein it granted defendant's motion to quash service of summons and to dismiss suit as to defendant.
3. The trial court erred in finding a contractual

basis upon which to support its Judgment in favor of plaintiff in the sum of Ten Thousand Nine Hundred Eighty Dollars (\$10,980) for commissions due on the sale of one hundred twenty-two (122) tractors.

Dated: February 8th, 1951.

/s/ SAMUEL S. STEVENS,

HELLER, EHRMAN, WHITE &
McAULIFFE,

Attorneys for Defendant-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 8, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO TRANSFER
OF ORIGINAL EXHIBITS

The parties hereto, being Defendant-Appellant and Plaintiff-Appellee, by their respective counsel hereby stipulate that the original exhibits introduced on the trial of this action and which hereinafter are described with particularity, may be transmitted to the Court of Appeals in lieu of the reproduction of the same exhibits as a part of the printed record on appeal. Said exhibits are described as follows:

Plaintiff's Exhibits

1. Contract between Gravely Motor Plow & Cultivator Co. and H. V. Carter Co.

2. Carbon copy of Purchase Order dated 4/20/45.

3. Letter, 8/23/46, John W. Heinen to H. V. Carter Co.

5. Letter, 4/30/46, Graves to Gravely Co. and reply dated 5/14/46.

6. Decree of Distribution in Estate of H. V. Carter and consent thereto.

7. Letter, Graves to Hall, with list of orders attached.

8. Invoices for work done by builders and material men on Carter premises.

9. Defendant's Bulletin explaining buy-in-advance orders.

10. Document showing request to increase orders.

12. Bulletin directed to All Dealers and Distributors dated 1/1/43.

13. Letter, 6/4/45, Hall to Graves.

15. Letter, 8/25/45, H. V. Carter Co., Inc., to Gravely Motor Plow & Cultivator Co.

16. Letter, 11/18/46, from Gravely Pacific Co.

Defendant's Exhibits

No. P. Two working agreements signed by Hall and Graves.

No. Q. Letter, 4/15/46, Heinen to Graves.

No. R. Letter, 4/18/46, Graves to Heinen.

No. S. Letter, 4/27/46, Heinen to Graves.

No. T. Letter, Graves to Gravely Pacific, Inc., 5/2/46.

No. U. Letter, Heinen to Graves, 5/9/46.

No. V. Letter, Heinen to Graves, 6/1/46.

No. W. Letter, Heinen to Graves, 6/25/46.

No. X. Series of letters from July 3, 1946.

No. Y. Letter, Gravely Pacific to D. E. Graves, 7/11/46.

No. Z. Letter, Heinen to Graves, 7/29/46.

No. AA. Letter, Heinen to Graves, 8/14/46.

No. BB. Letter, D. Ray Hall to Graves, 9/5/46.

No. CC. Gravely Bulletin #21, 2/2/45.

No. DD. Gravely Bulletin, 6/10/45.

No. EE. Form letter, H. V. Carter Co., 1/15/47.

No. FF. Letter and Purchase Order, Graves to Gravely Co. of Dunbar, W. V., 6/28/43, and reply.

No. GG. Letter, Graves to Hall, 10/12/42, and reply, 10/19/42.

No. HH. Order #23795 and correspondence, 1/10/44.

No. II. Letter, Hall to Graves.

No. JJ. Order, 4/30/45, with attached correspondence.

No. KK. Letter, 7/11/46, Heinen to Graves.

No. LL. Letter, 7/29/46, Heinen to Graves.

No. NN. Letter, 7/31/46, Graves to Heinen.

Dated: February 8th, 1951.

/s/ FRANCIS CARROLL,
/s/ DAVID FREIDENRICH,
CARROLL, DAVIS &
FREIDENRICH,
Attorneys for Plaintiff-
Appellee.

/s/ SAMUEL S. STEVENS,
HELLER, EHRMAN, WHITE &
McAULIFFE,
Attorneys for Defendant-
Appellant.

So ordered.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WM. E. ORR,

/s/ WALTER L. POPE,
United States Circuit Judges.

[Endorsed]: Filed February 15, 1951.

No. 12,844

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GRAVELY MOTOR PLOW AND CULTIVATOR
COMPANY (a corporation),

Appellant,

VS.

H. V. CARTER Co., INC. (a corporation),

Appellee.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

BRIEF FOR APPELLANT.

SAMUEL S. STEVENS,

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FILED
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No. 12,844

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GRAVELY MOTOR PLOW AND CULTIVATOR
COMPANY (a corporation),

Appellant,

VS.

H. V. CARTER Co., INC. (a corporation).

Appellee.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

BRIEF FOR APPELLANT.

JURISDICTION.

This cause was commenced on February 13, 1947, in the Superior Court of the State of California in and for the City and County of San Francisco to recover damages for an alleged breach of contract for failure to fill orders for a quantity of garden tractors and also damages resulting from expenses allegedly incurred by plaintiff in the remodelling of its premises, the amount for which judgment was demanded being \$24,160, exclusive of interest and costs. (R. 3 to 13.)

On March 17, 1947, a petition for removal of this cause was filed in said Supreior Court and an order for removal was entered by said Superior Court (R. 13 to 18), that being within the time allowed by Title 28 U.S.C.A. Section 72, inasmuch as that was at or before the time the defendants were required by Section 407 of the Code of Civil Procedure of California to answer or plead to the complaint of plaintiff. Thereafter, on April 15, 1947, the defendants filed in the District Court of the United States for the Northern District of California, Southern Division, a certified copy of the record in such suit commenced in such Superior Court. (R. 19 and 20.)

This cause was removed to the District Court for the Northern District of California, Southern Division, by defendants Gravely Motor Plow and Cultivator Company and Gravely-Pacific, Inc., both non-residents of California, pursuant to Title 28 U.S.C.A. Section 71, this being a suit of a civil nature at law, of which the District Courts of the United States were given jurisdiction. (R. 3 to 13.) The District Court for the Northern District of California, Southern Division, had jurisdiction of this cause by reason of Title 28 U.S.C.A. Section 41(1), this being a suit of a civil nature at law where the matter in controversy exceeds exclusive of interest and costs the sum of \$3,000, and is between citizens of different states, the defendants being citizens of West Virginia and the plaintiff of California. (R. 3 and 4.) There are no other parties, the action having been dismissed as to Gravely Motor Plow and Tractor Co., Inc. Upon the

repeal of Section 41(1) the District Court has jurisdiction by reason of Title 28 U.S.C.A. Section 1332, because of diversity of citizenship.

A judgment was entered in this cause by the District Court in favor of plaintiff and against defendant Gravely Motor Plow and Cultivator Company on March 21, 1950, for \$10,980, together with interest and costs. (R. 76 and 77.)

The orders of the District Court amounting to final decision, were entered on October 18, 1950. (R. 83 and 84.) This appeal was taken pursuant to Title 28 U.S.C.A. Sections 1291 and 1294(1). The notice of appeal and cost bond on appeal were filed November 14, 1950. (R. 80 to 82.)

STATEMENT OF THE CASE.

This is an appeal by appellant Gravely Motor Plow and Cultivator Company from a judgment for appellee H. V. Carter Co., Inc. in an action for damages for failure to fill orders for 122 so-called garden tractors manufactured by appellant.

For the purpose of convenience in this brief, appellee H. V. Carter Co., Inc. will be referred to as "Carter", appellant Gravely Motor Plow and Cultivator Company will be referred to as "Gravely", and defendant below Gravely-Pacific, Inc. will be referred to as "Pacific".

Upon removal of this cause to the District Court, a motion to quash service of summons on appellant

Gravely was duly made, the motion being predicated on the ground that Gravely was not doing business in the State of California. This motion was denied. (R. 52.)

At the commencement of the trial and at the conclusion thereof, the motion to quash service of summons on Gravely was again urged. Gravely's answer also raised this issue. (R. 56.) The trial Court entertained the motion on both occasions deferring judgment, however, until the case was finally submitted on briefs. Judgment was rendered quashing service of summons on and dismissing the action as to Gravely and was also rendered in favor of its co-defendant below, Pacific. (R. 64, 65.)

On Carter's motion for a new trial and to alter or amend judgment, the trial court annulled its previous judgment on the ground that it was not within the court's province to review the order of the judge of coordinate jurisdiction who originally denied the motion to quash service on Gravely and that the ruling of this judge of coordinate jurisdiction had become the law of the case. Judgment was thereupon finally rendered by the trial court against Gravely and in favor of Pacific, from which judgment this appeal has been taken. (R. 76, 77.)

Both Gravely and Pacific are corporations organized under the laws of the State of West Virginia. Pacific, at the time of the filing of the action and the service of summons was qualified to do and was doing business within the State of California. The

manager in California of Pacific was John W. Heinen who was designated as a person upon whom process might be served. (R. 149.) At the time the action was filed and summons served on Heinen for the purpose of attempting to obtain jurisdiction of both Gravely and Pacific, Gravely was not qualified to do and was not doing business within the State of California, nor was Heinen then or at any time an officer, agent or representative of, Gravely. (R. 24, 26.)

It was admitted that during a period of 21 years, 1925 to August 1946, Carter and its predecessor were dealers of Gravely products in northern California and portions of central California. During this period of 21 years, on two occasions Carter operated as a dealer of Gravely products under written contracts conferring exclusive sales privileges, but during the years 1943 to 1946, Carter was a non-exclusive dealer of Gravely products. (R. 108, 109.)

In 1945, Pacific was incorporated and Heinen became the manager in California of this corporation, which was thereafter to be the distributor of Gravely products in the western states. It was admitted that a majority of the stock in Pacific is owned by Gravely and that in some instances officers of Gravely are also officers of Pacific. Gravely maintains its principal office at Dunbar, West Virginia, and Pacific maintains its principal office at South Charleston, West Virginia, and a place of business in Los Angeles, California. Each corporation employs separate personnel, the books of account and other records of each

corporation are kept at their respective offices, and each corporation has separate auditors. (R. 38, 39, 238.) Each corporation has separate capitalization, issues separate financial statements and files separate income tax returns. (R. 243.)

Gravely manufactures the tractors, while Pacific is solely a distributing outlet purchasing Gravely products, pursuant to a written contract on terms net cash in 30 days with payments for all purchases, whether equipment or parts, being made by Pacific by its check or checks payable to Gravely. (R. 42-48.) All offers of Pacific to purchase are accepted by Gravely in Dunbar, West Virginia, and shipments are made by Gravely to Pacific via freight, truck, express or parcel post in interstate commerce. The supply of parts maintained by Pacific in California is solely owned by it and held for sale to the trade along with service and repair facilities which are also offered to the trade at a profit to Pacific. (R. 155.)

Twenty other corporations similar to Pacific were organized for selling, distributing and serving Gravely products throughout the United States, the controlling stock of all of which corporations is owned by Gravely. (R. 161.)

The unfilled orders of Carter, with the exception of the order for 45 tractors placed in July 1946, were submitted during the period of the war, to-wit, in the years 1943 to 1945, inclusive. During these years Gravely was operating under War Production Board Regulations restricting the production of its products,

and it was also subject to government rationing and priority ratings.

The 122 tractors, orders for which are the subject matter of this action, can be broken down as follows: 29 thereof were Gravely Model D tractors (Exhibit "FF"), and the remaining 93 were Gravely Model L tractors. This breakdown further shows that 75 of the 122 tractors were included in two large group orders, the first thereof dated June 28, 1943, being for 30 tractors (Exhibit "FF"), and the second thereof being the one of July 3, 1946, for 45 tractors. (Exhibit "X".) The remaining 47 tractors were covered by individual orders which were placed by Carter during the war years 1943 to 1945, inclusive, many of which specified the name and address of the ultimate purchaser. (Exhibit "HH".)

The group order for 30 tractors placed by Carter on June 28, 1943, included 25 Model D and 5 Model L. Gravely acknowledged receipt of this order on July 1, 1943 as follows:

"There is nothing expected that will make the conditions of selling much different from what it was this year. We do know we will be allowed to sell on priority ratings, but this must be an AA-4 or higher. * * *

"But, at any rate, we would appreciate the order and will hold it until such a time we can see what we can do in the way of shipping. I am not at all sure that we could get that much equipment, but I would like to offer for your suggestion that both of us keep in mind of shipping you a full carload of tractors for possibly late this year. This would

save us both considerable expense.” (Emphasis added.) (Exhibit “FF” reverse side.)

In addition to the 25 Model D tractors covered by this order, 4 of the individual orders were for Model D tractors. The manufacture of Model D tractors in America by Gravely was discontinued in 1942, and thereafter this model was manufactured only in England. Since the end of the war, Gravely had received only a total of 25 Model D tractors of which 3 were delivered to Pacific. (R. 214 to 216.)

In connection with the individual orders for 47 tractors placed by Carter, Gravely’s acknowledgment was in the form of a mimeographed letter sent to such ultimate purchasers whose names had been supplied by Carter and which letter set forth conditions in connection with the placing of the orders, some of which were as follows:

“1. Due to Government restrictions, we cannot guarantee delivery of the equipment on your order. * * *

3. The order is placed with the understanding that we will fill it as quickly as possible. We cannot recognize any promised or implied time of delivery. * * *

There are as many factors over which we have no control, that it is impossible for us to predict a delivery date.” (Exhibit “II”, page 2.)

On cross-examination, Carter’s president and general manager, admitted familiarity with the mimeo-

graphed form of acknowledgment sent to these ultimate purchasers by Gravely, and further admitted that their names were supplied by Carter in order that Gravely might send this acknowledgment to them. (R. 135, 136.)

It was undisputed that there was no acknowledgment whatsoever by either Gravely or Pacific of the large group order for 45 Model L tractors sent by Carter on July 3, 1946. (Exhibit X.) This order was sent to Pacific accompanied by a proposed agency contract which was signed by Carter but which was never executed by Pacific, a copy of the order being also sent to Gravely.

After entry of the final judgment, Gravely and Pacific filed a motion to alter, amend and make additional findings of fact and conclusions of law and to amend the final judgment accordingly, which motion was denied in its entirety. (R. 78, 79, 83.) Carter filed its motion to amend the final findings of fact by making an additional finding of fact to the effect that Gravely was at the time of the commencement of the action and the issuance of process therein, and had been prior thereto, doing business within the State of California, which motion was also denied. (R. 83, 84.)

The questions involved in this case are first, was Gravely doing business within the State of California at the time process was served on Heinen, and second, were the orders for the 122 tractors placed by Carter accepted by Gravely.

SPECIFICATIONS OF ERRORS.

Appellant Gravely relies upon the following specification of errors:

1. The trial court and the judge of coordinate jurisdiction each erred in denying the motion to quash service of summons on Gravely.

2. The trial court erred

(a) In finding "That plaintiff was not at any time a dealer or agent of 'Pacific'." (R. 73.) Such finding is clearly erroneous and is unsupported by the evidence, since from and after the month of July 1945, Carter was a non-exclusive dealer of Pacific from whom it received tractors and with whom it was seeking to enter into an exclusive dealer's contract. (R. 109, 140, 141, Exh. XX.)

(b) In finding "That at all of the times the orders for 122 tractors, the subject matter of this action, were forwarded to 'Gravely', the plaintiff was a non-exclusive dealer in 'Gravely' products and continued as such dealer until August 23, 1946". (R. 73.) Such finding is clearly erroneous and is unsupported by the evidence since Carter received tractors from Pacific and also submitted to Pacific on July 3, 1946, its order for 45 tractors. (R. 141, Exh. X.)

(c) In finding "That the said orders for 122 tractors were placed by plaintiff with defendant 'Gravely' between the beginning of World War II and August 23, 1946". (R. 73, 74.) Such finding is clearly erroneous and is unsupported by the evidence

since Carter submitted to Pacific on July 3, 1946 its order for 45 tractors. (Exh. X.)

(d) In finding "That the said orders for 122 tractors were accepted by 'Gravely' with the qualifications that deliveries would be made as soon as conditions created by the War would permit". (R. 74.) Such finding is clearly erroneous and is unsupported by the evidence since there was never any unqualified or unequivocal acceptance by Gravely of any of the orders for 122 tractors. The evidence shows that the acknowledgment by Gravely of the orders for 47 tractors for ultimate purchasers was with definite qualifications (Exh. II), and similarly the acknowledgment of the group order for 30 tractors on June 28, 1943 was definitely qualified. The evidence is undisputed that the order for 45 tractors on July 3, 1946 submitted to Pacific with a copy to Gravely was not acknowledged in any manner by Pacific or Gravely.

(e) In finding "That all of said orders for 122 tractors were for 'ultimate purchasers', persons who had agreed to purchase the tractors from the plaintiff". (R. 74.) Such finding is clearly erroneous and is unsupported by the evidence since 75 of the 122 tractors were covered by the group orders of June 28, 1943 and July 3, 1946. (Exh. FF, X.)

(f) In finding "That after restrictions occasioned by the War were alleviated or removed, 'Gravely' in the years 1945, 1946 and 1947, shipped to 'Pacific', its California distributor, more than 122 tractors". (R. 74, 75.) Such finding is clearly erroneous and is un-

supported by the evidence as it is undisputed that after its incorporation Pacific was the distributor of Gravely products originally in five western states and subsequently in four of these states.

(g) In finding "That all of said orders for 122 tractors were orders placed with plaintiff by the 'ultimate purchasers' and forwarded by plaintiff to defendant 'Gravely' ". (R. 75.) Such finding is clearly erroneous and is unsupported by the evidence since 75 of the 122 tractors were covered by the group orders of June 28, 1943 and July 3, 1946. (Exh. FF, X.)

3. The findings of fact and conclusions of law are insufficient to support the judgment since the trial court failed and refused to find that Gravely was, at the time of the commencement of the action and the issuance of process therein and had been prior thereto, doing business within the State of California. (R. 83, 84.)

4. That the judgment of the trial court is contrary to and unsupported by law.

ARGUMENT.

SUMMARY OF ARGUMENT.

1. The attempt to obtain jurisdiction of Gravely by service of process on Heinen, the manager of Pacific, was entirely ineffectual since Heinen was not then or at any time an officer, or general manager of Gravely, and Gravely was not qualified to do nor was it doing business within the State of California.

2. The acknowledgments by Gravely of receipt from Carter of the orders for 47 tractors for ultimate purchasers and the group order of June 28, 1943 for 30 tractors, were definitely qualified and equivocal, and therefore there was no acceptance of these orders such as the law requires in order to constitute a binding contract.

3. There is no evidence whatsoever of any acknowledgment by either Gravely or Pacific of the group order for 45 tractors sent by Carter on July 3, 1946. Therefore one of the essentials required by the law before a contractual obligation arises, that of acceptance of the offer, is entirely lacking with respect to this order.

I. JURISDICTION OF GRAVELY WAS NOT OBTAINED BY SERVICE OF PROCESS ON THE MANAGER OF ITS SUBSIDIARY, PACIFIC.

Jurisdiction over Gravely, a West Virginia corporation, was purportedly obtained by service of process upon John W. Heinen, an employee of Pacific. Pacific, a corporate subsidiary of Gravely, is also a West Virginia corporation and Heinen is employed as its manager in California having no connection whatsoever with Gravely.

Heinen was designated by Pacific as its agent for service of process but it is undisputed that he was not so designated by Gravely. No contention is made that Heinen is the "president or other head of the corporation, a vice president, a secretary, an assist-

ant secretary, or the general manager” of Gravely,—those persons upon whom process may be served in order to obtain jurisdiction of a foreign corporation under the provisions of Section 6500 of the Corporations Code of California.

Also, if as Carter asserts, Gravely was doing business in California without having qualified to do so then the applicable statute would be Section 6501 of the Corporations Code of the State of California. That statute provides:

“If the agent for the service of process designated cannot be found with due diligence at the address given, or if the agent designated is no longer authorized to act, or if no person has been designated and if no one of the officers or agents of the corporation specified in Section 6500 can be found after diligent search and it is so shown by affidavit to the satisfaction of the court or judge, then the court or judge may make an order that service be made by delivery to the Secretary of State or to an assistant or deputy secretary of state * * *”

Carter made no attempt to comply with this statute.

Elementary principles of law conclusively demonstrate that prior to the incorporation of Pacific in 1945, Gravely was not doing business in this State merely because it sold its products to Carter and other distributors. It is basic law that an offer to purchase made by Carter in California and forwarded to West Virginia for acceptance is simply a transaction in interstate commerce. It is submitted, however, that it

is immaterial whether or not Gravely was doing business in California prior to the incorporation of Pacific. In order to confer jurisdiction, Carter must establish that Gravely was doing business in California at the time of the service of process. *Jameson v. Simonds Saw Co.* (1906), 2 Cal. App. 582, 84 Pac. 289.

Gravely does not deny that the promotive efforts of the subsidiary in California were of benefit to the parent. It must be pointed out, however, that such benefit was merely incidental to the main benefit secured by the subsidiary. Every business transaction has its primary and its incidental benefits, even though the parties to such transactions are completely separate entities. The fact that Pacific was authorized to obtain dealers in California and that it terminated the relationship between Carter and Gravely lends no strength to Carter's position. In so doing Pacific was merely fulfilling its designated duties as a subsidiary of Gravely.

The distinguishable functions of Pacific and Gravely are aptly characterized in *Irvine Co. v. McColgan* (1945), 26 Cal. (2d) 160, 157 Pac. (2d) 847, where, at page 165, the court says:

“Transactions engaged in *for* a foreign corporation in a state are not necessarily engaged in *by* the corporation in that state.”

As the court said in *Philadelphia and Reading Railroad v. McKibbin* (1917), 243 U.S. 264 at page 265, 61 L. Ed. 710 at page 711:

“A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the State the process will be valid only if served upon some authorized agent.”

Certainly it cannot be held that Gravely was “present and doing business” in California merely because Pacific engaged in transactions *for* Gravely, nor can it be held that the service of process on Heinen was valid.

In *Matrozos v. Gulf Oil Corp.* (1943), 54 F. Supp. 714, the court reviews a factual situation analogous to the instant case. Therein service of process was made on an employee of Gulf Oil, who was designated as Gulf’s agent for service of process in an attempt to acquire jurisdiction over a foreign subsidiary of Gulf Oil. The court, in quashing service of process, said, at page 715:

“It is the contention of the movant that the Gulf Oil Corporation was not its general agent but had authority to act only in limited matters upon specific request, and that it had no authority to accept service of process for the subsidiary.

“The questions involved seem to be two in number.

“Even if the Gulf Oil Corporation could be proved to stand in such a position to the moving respondent that service could validly be made

upon the former for the latter, was Greene possessed of such authority (expressly or by implication) that service upon him as a Gulf employee constituted service upon the Mene Grande Oil Company, C.A.?

“It is my opinion that he was not. He does not appear to be ‘an officer, a managing agent or general agent’ of either respondent, and although he was an agent authorized by appointment to receive service for Gulf Oil Corporation, it is not shown that he was so appointed for the Mene Grande Oil Company, C.A. In fact, the contrary appears.

“Since Green had only limited authority to act, the libelant was powerless to enlarge the agency. On that ground alone, the present motion should be granted. (Citing cases.)”

In the case at bar, Carter seeks to “enlarge” the agency of Heinen. This it cannot do. As the court said in *Favell Utley Realty Co. v. Harbor Plywood Co.* (1950), 94 F. Supp. 96 at page 97, “The first question before this court is one of state law.” In the instant case, Carter did not comply with the State law, which would necessarily have been the first step in acquiring jurisdiction over Gravely, and it is submitted that the attempt to acquire jurisdiction over Gravely by service on an employee of Gravely’s corporate subsidiary was completely ineffectual.

It is fundamental law that service upon a corporation’s subsidiary is not service upon the parent corporation. This principle was enunciated by the United States Supreme Court in the case of *Cannon Mann-*

facturing Co. v. Cudahy Packing Co. (1924), 267 U.S. 33, 45 S.Ct. 250, 69 L. Ed. 634, and has been reiterated by every well-considered case to date. In *Amtorg Trading Corp. v. Standard Oil Co. of Calif.* (1942), 47 Fed. Supp. 466, the court held that the doing of business by a foreign corporation through a subsidiary does not constitute a "doing of business" within the state, so as to make the foreign corporation amenable to process of the state, and that the service of process upon an officer of the subsidiary was not service upon the parent corporation. See also *Echeverry v. Kellogg Switchboard & Supply Co.* (1949), 175 Fed. (2d) 900; *Favell Utley Realty Co. v. Harbor Plywood Co.*, supra (D.C. Ninth Circuit).

Those few cases in which the parent and subsidiary arrangement have been disregarded are not accorded much weight, and in this connection it is interesting to note the comment on *Industrial Reserve Corp. v. Gen. Motors Corp.* (1928), 29 Fed. (2d) 623, in *Balantine on Corporations*, Rev. Ed. 1946, at page 325:

"* * * this case which ignores the corporate entity of the subsidiaries for purposes of jurisdiction and service of process upon the parent on a liberal instrumentality theory, is of very doubtful soundness and authority and is difficult to reconcile with decisions of the United States Supreme Court and other federal courts." (Citing *Cannon v. Cudahy*, supra, and other authorities.)

The *Cannon* case involves facts almost identical with the case at bar. Therein the defendant Cudahy, a Maine corporation, established a subsidiary corpo-

ration, the Cudahy Packing Company of Alabama, to market its products within the State of North Carolina. Process was served upon the process agent of the subsidiary and the plaintiff undertook to establish identity between the defendant, the Maine corporation, and its subsidiary, the Alabama corporation. The facts reveal that the subsidiary bought from the defendant and sold to dealers. Goods packed by the defendant in Iowa were shipped direct to dealers and the subsidiary corporation collected the price. Through ownership of the entire capital stock and otherwise, the parent corporation dominated the Alabama corporation completely and exerted its control in substantially the same way, and through the same officers, as it did over those selling branches or departments of its business not separately incorporated which were established to market the Cudahy products in other states. The Supreme Court, commenting upon the recited facts, remarked at page 335 (U.S.) and page 641 (L. Ed):

“The existence of the Alabama corporation as a distinct corporate entity is, however, in all respects observed. Its books are kept separate. All transactions between the two corporations are represented by appropriate entries in their respective books in the same way as if the two were wholly independent corporations.” (Emphasis added.)

The court then goes on to raise the question as to whether or not this corporate separation, carefully maintained, must be ignored in determining the existence of jurisdiction. Answering this question in the

negative, the court said at page 336 (U.S.) and page 642 (L. Ed.):

“The defendant wanted to have business transactions with persons resident in North Carolina, but, for reasons satisfactory to itself, did not choose to enter the state in its corporate capacity. It might have conducted such business through an independent agency without subjecting itself to the jurisdiction. *Bank of America v. Whitney Cent. Nat. Bank*, *supra*. It preferred to employ a subsidiary corporation. Congress has not provided that a corporation of one state shall be amenable to suit in the Federal court for another state in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein. Compare *Lumiere v. Mac Edna Wilder*, 261 U.S. 174, 177, 178, 67 L. Ed. 596, 600-602, 43 Sup. Ct. Rep. 312. That such use of a subsidiary does not necessarily subject the parent corporation to the jurisdiction was settled by *Conley v. Mathieson Alkali Works*, 190 U.S. 406, 409-411, 47 L. Ed. 1113, 1115, 1116, 23 Sup. Ct. Rep. 728; *Peterson v. Chicago, R.I. & P.R. Co.*, 205 U.S. 364, 51 L. Ed. 841, 27 Sup. Ct. Rep. 513; and *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79, 87, 62 L. Ed. 587, 590, 38 Sup. Ct. Rep. 233, Ann. Cas. 1918C, 537. In the case at bar, the identity of interest may have been more complete, and the exercise of control over the subsidiary more intimate, than in the three cases cited, but that fact has, in the absence of an applicable statute, no legal significance. The corporate separation, though perhaps merely formal, was real. It was not pure fiction.”

If the facts of the *Cannon* case and those of the case at bar differ, then such difference serves to emphasize to a greater degree the separate nature of Gravely and Pacific.

The evidence produced at the trial as well as the affidavits in support of the motion to set aside the service of summons on Gravely delineate facts of great importance on the jurisdictional aspects of this case. A review of those facts in the light of the *Cannon* case, *supra*, impels the obvious conclusion that Gravely and Pacific are separate entities. Admittedly, Gravely owns a majority of stock in Pacific and in some instances officers of Gravely are also officers of Pacific. However, the evidence on the manner and mode of internal operation of each corporation clearly establishes the separate and completely independent existence of parent and subsidiary.

Pacific maintains its office in South Charleston, West Virginia, and Gravely maintains its office at Dunbar, West Virginia. Each corporation employs separate personnel, the books of account and other records of each corporation are kept at their respective offices, and each corporation has separate auditors. Each corporation has separate capitalization, issues separate financial statements, and each corporation files a separate income tax return. (R. 38, 39, 238, 243.)

Gravely is concerned with the manufacture of tractors, while Pacific is solely a distributing outlet and was incorporated together with twenty similar subsidiaries in accordance with a nationwide plan for

obtaining proper representation and distribution of Gravely's products. (R. 161.) Gravely at no time transacted business in California, in the jurisdictional sense. Pacific, on the other hand, since its incorporation in 1945 has been doing business in California and has designated an agent for the service of process in this State. Pacific purchases Gravely's products on a basis of terms net cash in thirty days, and payments for all purchases, whether equipment or parts, are made by Pacific by its check or checks payable to Gravely. All offers of Pacific to purchase are accepted by Gravely in Dunbar, West Virginia, and shipments are made by Gravely to Pacific via freight, truck, express or parcel post in interstate commerce. Any supply of parts maintained by Pacific in this State is owned by Pacific and held for sale to the trade, along with service and repair facilities which are also offered to the trade at a profit to Pacific. (R. 155.)

While there is admittedly a close connection and frequent communication between Gravely and Pacific, it is submitted that such communication and related transactions are done in the course of legitimate interstate commerce and in keeping with established principles of corporate law governing parent and subsidiary corporations. Certainly, the facts of the case at bar demonstrate the "*corporate separation, carefully maintained*" described in the *Cannon* case, *supra*.

In *Crane v. Gravely Motor Plow and Cultivator Company* (1947), 69 N.Y. Supp. (2d) 175, Gravely,

the same defendant sued herein, was involved in litigation in the State of New York. The New York Supreme Court (Appellate Division) held the fact the corporation doing business in the State was a foreign corporation's subsidiary (performing the same function as Pacific in the instant case) and was engaged in the business of purchasing and reselling the foreign corporation's products, did not make the subsidiary the foreign corporation's agent on which summons could be served in an action against the foreign corporation. In this case, the New York Supreme Court (Appellate Division) was considering the identical jurisdictional facts that are presented in the case at bar.

The courts, in examining the factors which make the subsidiary the agent of the parent corporation for service of process, have scrutinized a variety of situations and have held that mere combination of insufficient factors does not change the result—the parent corporation is still not doing business within the state. *Oyler v. J. P. Seeburg Corp.* (1939), 29 Fed. Supp. 927.

LaVarre v. International Paper Co. (1929), 37 Fed. (2d) 141, clearly sets forth the rule of law relative to the ownership of the subsidiaries stock by the parent corporation, the court saying at page 145:

“It is well settled that ownership of stock in a subsidiary which is doing business within a state does not bring the company owning or controlling the stock within the state in the sense of ‘transacting business’ therein, and does not subject the

parent company to local jurisdiction for the purpose of service of process upon it. (Citing cases.) In these cases the Supreme Court of the United States has clearly and definitely held that the fact that what is popularly known as a subsidiary corporation is doing business in the state is not sufficient to bring the parent corporation therein for the purpose of service of process upon it. (Citing cases.)

“For example, the court in *People’s Tobacco Company v. American Tobacco Company*, *supra*, speaking through Mr. Justice Day, says: ‘The fact that the company owned stock in the local subsidiary companies did not bring it into the State in the sense of transacting its own business there.’

“And, again, in *Philadelphia & Reading R. R. Co. v. McKibbin*, *supra*, where Mr. Justice Brandeis says: ‘Nor would the fact, if established by competent evidence, that “subsidiary companies” did business within the state, warrant a finding that the defendant did business there.’

“In the *Whitney bank case*, *supra*, the court said: ‘The jurisdiction taken of foreign corporations, * * * does not rest upon a fiction of constructive presence * * * It flows from the fact that the corporation itself does business in the state or district in such a manner and to such an extent that its actual presence there is established.’

* * * * *

“For example, in *Peterson v. Chicago, Rock Island & Pacific R. R. Co.*, *supra*, the undisputed facts showed that from a practical standpoint the

relationship between the parent corporation and the subsidiary was practically identical, yet the Supreme Court held that such intercorporate relationship was insufficient to make the two corporations one for purpose of service of process.

* * * * *

“It will serve no useful purpose to consider in detail all the many cases decided by the Supreme Court of the United States of this question. In all these cases, the identity of organization between subsidiary and parent corporation was more or less complete, and yet the court refused to disregard the established rule regarding corporate entity.”

The law, as stated in *Jameson v. Simonds Saw Co.*, supra, which has never been challenged, placed upon Carter the burden of proving that Gravely was “doing business” within the state. Complete failure of Carter to meet this burden of proof imposed on it is disclosed by the evidence in this case.

The rule determining whether or not jurisdiction exists as to Gravely is that set forth by the Supreme Court of the United States in the leading case of *Cannon v. Cudahy*, supra, and applying this authority to the case at bar leads to the inescapable conclusion that the attempt to obtain jurisdiction of Gravely by service of process on the manager of its subsidiary, Pacific, is entirely ineffectual.

**II. THERE WAS NO ACCEPTANCE BY GRAVELY OF THE
ORDERS BY CARTER FOR THE 122 TRACTORS.**

**A. The acknowledgments by Gravelly of the orders for 77
tractors were qualified and equivocal.**

The principal question in this case apart from the issue of jurisdiction of Gravelly is, was there a binding contract between Carter and Gravelly for the sale of 122 tractors.

Elementary principles of law require that the existence of such a contract presupposes that there must be an offer by Carter and an acceptance by Gravelly, and the authorities hereinafter cited will show that such acceptance must be unequivocal and unqualified in order to constitute a binding contract.

The mimeographed acknowledgment (Exhibit II) sent by Gravelly to the ultimate purchasers, whose names were furnished with certain of the 47 individual orders and with which Graves admitted familiarity, was certainly equivocal and qualified. These ultimate purchasers and Carter were told by Gravelly that the orders would be filled as quickly as possible but that no promised or implied time of delivery could be recognized nor could delivery be guaranteed due to governmental restrictions. This, we submit, does no more than inform the ultimate purchasers and Carter that the orders would receive Gravelly's best attention.

Certainly during the period of the war no one could forecast definitely its duration or outcome and Gravelly could not foretell the continuation of governmental restrictions or type thereof that would be imposed on

it during the war and the post war period. Gravely could not, therefore, accept orders from its dealers without imposing the foregoing qualifications made necessary because of circumstances beyond its control.

It is a matter of common knowledge that during the war years, consumers of articles, of which supply was limited and far exceeded by the demand, such as Gravely products and automobiles, would place orders with any number of different dealers in hopes of receiving the desired goods. This was the reason that Gravely repeatedly, after the termination of the war, requested Carter and its other dealers to "screen" and verify the authenticity of the backlog of orders because when restrictions were removed it would be a physical impossibility to fill all orders placed with Gravely by its dealers. (R. 115, 203, 250.) Gravely was seeking to ascertain from its dealers information with respect to the authenticity of the war-time orders which had been qualifiedly accepted in order that it might allocate tractors to them as production increased. (R. 202, 203.) Carter was advised by bulletins and by both Gravely's president and Heinen that "Buy in Advance" orders and orders with deposits would be filled first as the output permitted. Nevertheless it is admitted that Carter did not sell any "Buy in Advance" orders nor did they obtain any deposits on the old orders in accordance with the many requests of Gravely and Pacific. (R. 112, 203.)

The rule of law with respect to the requirement of a binding acceptance in order to create a contractual obligation is set forth in Restatement of the Law of Contracts, Section 58, as follows:

“Acceptance must be unequivocal in order to create a contract.

Comment: a. An offeror is entitled to know in clear terms whether the offeree accepts his proposal. It is not enough that the words of a reply justify a probable inference of assent.

Illustration: 1. A sends an order for goods to B. B replies that the order will receive his attention. There is no contract.”

In the early decision of *Mahar v. Compton* (1897), 45 N.Y. Supp. 1126 at 1128, the Supreme Court of New York stated the rule as follows:

“It is well settled, however, that, in order to establish a legal contract through the medium of correspondence, it must be made to appear that there was, not only a plain, unequivocal offer, but that the acceptance of such an offer was equally plain and free from ambiguity. In other words, there must have been an exact meeting of the minds of the contracting parties in respect to every detail of the proposed contract; and if the precise thing offered was not accepted, or if the acceptance was in any manner qualified by conditions or reservations, however slight they may have been, the universal rule seems to be that no valid contract is thereby established, but that such a modified or qualified acceptance must rather be treated as a rejection of the offer.” (Citing authorities.)

To the same effect: *Howard v. Chow* (1938), 27 C.A. (2d) 775, 81 Pac. (2d) 994; *Bullock v. Harwick* (1947), 158 Fla. 834, 30 So. (2d) 539; *Jahn & Co. v. McClaine* (1917), 97 Wash. 95, 165 Pac. 1060.

The courts have uniformly held that the acknowledgment of an offer which states it will receive prompt attention or best attention does not constitute an acceptance of the offer.

In *Davis v. McClure* (1927), 123 Kan. 454, 255 Pac. 1116, 1117, the court said:

“Acknowledgment of the receipt of an order and statement that ‘the same shall have prompt attention, or prompt and careful attention,’ has been held not to have been an acceptance of the order. (Citing authorities.)”

In *Davis & Co. v. Moultrie Cotton Mills* (1934), 48 Ga. A. 577, 173 S.E. 448, the court said:

“A letter, acknowledging the receipt of an order for the purchase of merchandise, which contains the statement that ‘this will have our best attention’, does not amount to an acceptance of the offer contained in the order, and there is not thereby created a contract of sale. (Citing authorities.)”

In *Bowser & Co. v. Crescent Filling Station* (1925), 133 S.C. 281, 130 S.E. 870, the offeree by postcard acknowledged the receipt of an order and informed the offeror it had been given a certain number and would receive prompt attention but no express acceptance of the order was communicated to the offeror. At page 871 (130 S.E. 870) the court said:

“The defendant’s written order was a mere proposal and not a contract until accepted by the plaintiff. (Citing authorities.) When did this written order, by virtue of the plaintiff’s acceptance, ripen into such a contract as could have been enforced by the defendant? The postcard acknowledgment by mail of the receipt of the order was not, we think, such binding acceptance.”

In *Armor Insulating Co. v. National Gypsum Co.* (1944), 71 Ga. A. 672, 31 S.E. (2d) 889, the offeree acknowledged the offer as follows:

“This order is under consideration in our office at the present time, and we believe the best procedure will be to enter it with the Portsmouth plant so that they can begin to make definite arrangements for fabrication. * * * The last paragraph of your kind letter is being checked with our production department in an effort to determine what program can be worked out on an order of this kind. * * *”

At page 884 (31 S.E. (2d) 880) the court said:

“The defendant in error (Gypsum) contends that Armor’s order of November 7, 1940, for Trava-coustic tile was never approved and accepted, and that no binding contract in this respect was ever made between the parties. We are of the opinion that the defendant in error is correct in its contentions. The placing of the order by Armor and the acknowledgment of the receipt thereof by Gypsum did not constitute a valid contract. It was ruled in *Evans v. Atlanta Paper Co.*, 21 Ga. App. 114, 117, 93 S.E. 1023, 1024, ‘The mere acknowledgment of the receipt of an order, even though coupled with the assurance that the same

should receive prompt attention, is not sufficient to show acceptance of the offer. The reason for this ruling is ably given in the case of *Manier v. Appling*, 112 Ala. 663, 20 So. 978, where the Supreme Court of Alabama held that: "Acceptance by a wholesale merchant of an order for the purchase of goods is not shown by evidence that the merchant wrote to the buyer, acknowledging receipt of the order and stating that it should have prompt attention." * * * In *Cheboygan Paper Co. v. Swigart Paper Co.*, 140 Ill. App. 314, *it was held that an acknowledgment of the receipt of an order, saying that the same had gone forward to the mill for their attention and would be filled as quickly as the orders now placed with the mill were out of the way, was not such an unconditional acceptance as to constitute a complete contract.*" (Emphasis added.)

See also:

Courtney Shoe Co. v. Curd & Son (1911), 142 Ky. 219, 134 S.W. 146.

The only evidence of an acknowledgment by Gravely of the order for the 30 tractors placed by Carter on June 28, 1943 was the letter from Gravely on July 1, 1943. (Exhibit "FF".) In this acknowledgment Gravely's president stated, "But, at any rate, we would appreciate the order and will hold it until such a time we can see what we can do in the way of shipping. I am not at all sure that we could get that much equipment * * *" Any contention that this letter of acknowledgment constitutes an unqualified acceptance of the order such as the law requires before

a contractual obligation arises is neither in agreement with the law or the undisputed evidence.

A decision directly in point with the circumstances in connection with this particular order is *Fenn v. American Rattan & Reed Mfg. Co.* (1921), 75 Ind. A. 146, 130 N.E. 129, in which the offeree acknowledged the offer as follows:

“We note that you wish us to enter an additional order for three more cars for shipment January, February and March which we are perfectly willing to do, but cannot make promises as to delivery. In fact, if you will let this lie in abeyance until the latter part of January we will be in a better position to advise what we will be able to do for you in reference to this order.”

The offeror in this case had filed a cross-complaint based upon the breach of an alleged contract arising from its offer and the foregoing acceptance. A demurrer to the cross-complaint was sustained by the lower court which action was affirmed, the court stating at page 130 (130 N.E. 129):

“There was no error in sustaining the demurrer to the cross-complaint. The correspondence does not show a contract between the parties. Appellee expressly stated in its letter, answering appellant’s letter of December 21, 1915, that if appellants would let the matter lie in abeyance until the latter part of January appellee would be in a better position to advise what it would be able to do with reference to the order. Abeyance is defined by Webster as a condition of being undetermined. It is clear that there was no accept-

ance of the order, nor was there any modification by appellee of the appellant's order, which was afterward accepted by appellants."

See, also:

Armor Insulating Co. v. National Gypsum Co.
(supra).

B. There was no acknowledgment by Gravely or Pacific of the order for 45 tractors.

Coming to the last order of Carter for the 45 tractors, which was placed on July 3, 1946, it is undisputed that this order was not acknowledged in any manner whatsoever by either Gravely or Pacific. (R. 138, 139.) In fact any business relationship existing between the parties was terminated by Pacific approximately seven weeks thereafter, on August 23, 1946. (Exh. 3.) Hence in connection with this order, one of the essentials required by the law before a contractual obligation arises, that of acceptance of the offer, is entirely lacking.

In commenting on the necessity of an acceptance before there can be a completed contract, in *Anderson Bros. & Johnson Co. v. Sioux Monument Co.* (1930), 210 Ia. 1226, 232 N.W. 689, 691, the court said:

"The written instruments were not completed contracts. Each was an order which contemplated that it should be accepted or acted upon by the other party.

"We had a similar case before us in *McCormick Harvesting Machine Co. v. Richardson*, 89 Iowa,

525, 56 N.W. 682, 683, where we reviewed the law in respect to such an order, and said:

“ “A proposal or offer, therefore, must in some way be accepted to constitute a sale.” Benj. Sales (Bennett’s Ed. 1892, Amer. Notes), p. 73. It has been held that such a writing does not constitute a contract until accepted or acted upon, and that prior thereto it may be withdrawn.
* * *

“ ‘In the light of these elementary principles and of the cases cited it seems clear that the writing in question does not constitute a contract in the absence of its acceptance, or of any action under it by the party whose duty it is to accept. It does not purport to be a contract between the parties. By it plaintiff was not obligated to do anything on its part. Plaintiff does not undertake, by the terms of the writing, to ship the twine on the proposed conditions. It is merely a request or a proposition from defendant to plaintiff that if the latter will ship certain goods he will pay a certain sum therefor at a fixed time. It may be said to be an order, but it lacks an essential element of a contract,—mutual assent. Being only a request or order, which required acceptance by the plaintiff to give it the force of a contract, it follows that it might be withdrawn or countermanded at any time prior to its being so accepted. We do not say that the acceptance must be a formal one. The acceptance might be shown by proving an act done on the faith of the order, such as the shipment of the goods ordered.’
“We think the written instruments in suit were orders and not completed contracts when signed

by the appellees. Something more was necessary before there could be a completed contract, namely, acceptance by the other party."

Reliance Bagging Co. v. Electric Gin Co. (1945), 208 Ark. 829, 187 S.W. (2d) 724, is a case in which it was held that an alleged contract failed because of the absence of an acceptance. The court at page 726 (187 S.W. 724) said:

"It is the law that the mere receipt of an offer to buy imposes no obligation to sell, and acceptance of such an offer is not to be implied from mere silence, on the contrary, failure to accept within a reasonable time implies a rejection of the offer, in which case no obligation rests upon either party."

It is therefore submitted that there is no evidence in this case of any unequivocal or unqualified acceptance of any of the orders for the 122 tractors, hence one of the essential elements before a contractual relationship arises is entirely lacking.

CONCLUSION.

Appellant Gravely respectfully prays that the judgment of the trial court be reversed upon the following grounds:

1. No jurisdiction of Gravely was obtained by service of process on Heinen, the manager of its subsidiary Pacific; and

2. There was no acceptance by Gravely of the orders placed by Carter for the 122 tractors.

Dated, San Francisco, California,
May 25, 1951.

Respectfully submitted,

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No. 12,844

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GRAVELY MOTOR PLOW AND CULTIVATOR
COMPANY (a corporation),

Appellant,

VS.

H. V. CARTER Co., INC. (a corporation),

Appellee.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

APPELLEE'S BRIEF.

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FILED
JUN 25 1935
PAUL R. DUBIE

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APPELLEE'S BRIEF.

The appellant's "Statement of the Case" is inaccurate, but appellee believes it will serve no useful purpose to restate it. The true facts of this case are disclosed in the Transcript of Record, and they speak for themselves. We do agree with appellant, however, that the two questions involved in this case are: (1) Was Gravelly doing business within the State of California at the time process was served on Heinen; and (2) were the orders for the 122 tractors placed by Carter accepted by Gravelly.

In its "Specifications of Errors" appellant finds fault with certain findings of the trial court. The first assignment of error deals with the action of the trial court and of Judge Harris in denying appellant's motion to quash service of summons on Gravely. This will be dealt with in our discussion under the heading of Jurisdiction. Appellant's second assignment of error concerns the court's finding "That plaintiff was not at any time a dealer or agent of 'Pacific.' " Insofar as appellant is concerned, this is an immaterial finding and does not possibly affect the judgment in this case. Appellant's next objection is that the lower court found that during all of the times the orders for 122 tractors were forwarded to Gravely, Carter was a non-exclusive dealer of Gravely products and continued as such dealer until August 23, 1946. No other finding is possible under the evidence submitted in this case, and appellant's conclusions as to why the finding is erroneous are wholly irrelevant.

Appellant next complains of the court's finding that plaintiff placed orders for 122 tractors with defendant Gravely between the beginning of World War II and August 23, 1946. It bases its objection upon the ground that Carter submitted to Pacific on July 3, 1946, its order for 45 tractors. This order, the record discloses, went both to Pacific and to Gravely, so that the finding is entirely correct. (R. 117.)

Appellant next takes exception to the court's finding "That the said orders for 122 tractors were accepted by 'Gravely' with the qualifications that de-

liveries would be made as soon as conditions created by the War would permit." There is ample evidence to support this finding, and we respectfully refer the court to the following pages of the transcript of record to sustain the same: Pages 101, 182, 210, 212, 224.

Appellant objects to the court's finding "That all of said orders for 122 tractors were for 'ultimate purchasers', persons who had agreed to purchase the tractors from the plaintiff." This finding is supported by the evidence. See R. 100, 101.

Appellant objects to the court's finding that more than 122 tractors were shipped to Pacific by Gravely in the years 1945, 1946 and 1947, because the court in such finding referred to Pacific as Gravely's "California distributor", whereas appellant points out that Pacific was the distributor for Gravely originally in five Western states and subsequently in four Western states. The fact remains, however, that Pacific was nonetheless Gravely's California distributor. The fact that it might have been distributor for Gravely products in Arizona or Nevada does not change the situation. Furthermore, Pacific's place of business was in California, and hence there is no error in the court's finding.

Appellant finally objects to the fact that the lower court "Failed and refused to find that 'Gravely' was at the time of the commencement of the action and the issuance of process therein and had been prior thereto, doing business within the State of California." Appellee agrees that there should have been

such a finding. However, it does not lie in the mouth of appellant to object thereto. Appellee, in the court below, duly filed its Notice of Motion to Amend the Findings of Fact by making an additional Finding of Fact pursuant to Rule 52(b) of the Federal Rules of Civil Procedure. The additional Finding of Fact requested, as disclosed in Vol. 1 of the Clerk's Certified Transcript of Record (R. 267, 270) provided:

“That ‘Gravely’ was at the time of the commencement of this action and the issuance of process therein and had been prior thereto doing business within the State of California.”

The printed record discloses, on page 83 thereof, an order of the trial court denying appellee's proposed additional finding. However, prior to the order of the trial court and upon the filing of appellee's proposed additional finding, appellant filed a motion in opposition to appellee's proposed additional finding (R. 269) and in said motion appellant stated: “A continued adherence to this decision prevents the court from making a finding on the jurisdictional issue. To rule otherwise would be patently illogical.” Appellant now urges before this court that the trial court's failure to grant appellee's motion to amend its findings by adding the proposed additional finding submitted by appellee constitutes reversible error. We submit that appellant is estopped from objecting in this court to failure of the trial court to make such finding by reason of its own action before the trial court in objecting to the proposed finding.

ARGUMENT.

1. Service of process upon Heinen as the person designated by Pacific to accept service of process constituted service upon Pacific and service upon Gravely, since Pacific was Gravely's corporate agent in California and was the instrumentality through which Gravely was doing business in California at the time of said service.

2. During the years 1943 to 1946 Carter was a dealer on behalf of Gravely in Northern California and forwarded to Gravely during this period of time orders for 122 tractors. All of these orders were accepted by Gravely, but Gravely notwithstanding its acceptance, sought to avoid the filling of the orders by discharging Carter as its dealer on August 23, 1946.

3. The trial court correctly found that although Gravely had the right to terminate Carter's relationship to it as a dealer, it could not legally avoid its obligation to Carter, and thus awarded the resultant damages.

I. JURISDICTION OF GRAVELY WAS OBTAINED BY SERVICE OF PROCESS ON THE MANAGER OF ITS SUBSIDIARY AND AGENT, PACIFIC.

Heinen, it is admitted, was the manager of Pacific in California. He was also the person designated by Pacific as its agent for service of process. If we assume for the sake of clarifying the first point, that Pacific was the agent of Gravely in California, then

it is clear that the proper way to obtain jurisdiction over Gravely in California in an action commenced in California was to serve its corporate agent, Pacific. Service upon Pacific had to be made by serving Heinen, and hence service upon Heinen constituted service upon Pacific and upon Gravely. Appellant would have this court believe that "If, as Carter asserts, Gravely was doing business in California without having qualified to do so, then the applicable statute would be Section 6501 of the Corporations Code of the State of California." This is the section that provides for service upon the Secretary of State "If no person has been designated and if no one of the officers or agents of the corporation specified in Section 6500 can be found * * *". Section 6500 of the Corporations Code of the State of California provides:

"Process directed to any foreign corporation may be served upon the corporation by delivering a copy to the person designated as its agent for service of process or authorized to receive service of process, or to the president or other head of the corporation, a vice-president, a secretary, an assistant secretary, *the general manager in this State*, or the cashier or assistant cashier of a bank." (Emphasis added.)

If we assume that Pacific is the corporate agent of Gravely in California and as such its general manager, then, of course, Pacific is the proper party to serve in order to obtain jurisdiction over Gravely. In order to avail one's self of Section 6501, an affidavit must be filed with the court setting forth that

no agent for the service of process specified in Section 6500 can be found after diligent search, and thereupon the court is required to make an order permitting service upon the Secretary of State. We submit that such an affidavit could not honestly be made by appellee in this case, since at the time of service in this case it was and still is appellee's honest belief that an agent specified in Section 6500 of the Corporations Code of the State of California could be found, namely, Gravely's general manager in California, Pacific, upon whom service could and should be made. Hence, Section 6501 is not and was not the proper section to follow insofar as service of process on Gravely's agent in California was concerned.

In *Milbank v. Standard Motor Construction Co.*, 132 Cal. App. 67, at page 70, the court states:

"The defendant further maintains that the service of process was not made on a 'managing agent' or 'business agent'. In the construction of this phrase there has always been a pronounced conflict in the authorities both state and federal, but the meaning of the term in this state is no longer susceptible of subtle distinctions, if we are to follow the recent construction of the expression as used in said Section 411 of the Code of Civil Procedure in *Roehl v. The Texas Company*, 107 Cal. App. 691, 704 [291 Pac. 255, 260] as follows: 'We hold the true rule to be * * * that "every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made."' * * * Whether in any given case the agent in question, is a

“managing agent” within what we have decided the meaning of that expression to be, must depend on the particular facts involved. It is impracticable to lay down a more concrete test of general validity.’ ”

In *Socony-Vacuum Oil Co. v. Superior Court*, 35 Cal. App. (2d) 92, service of process was made upon an individual who held a power of attorney from petitioner, Socony-Vacuum Oil Co., a New York corporation. The court held the individual served in California

“* * * was an agent of the petitioner corporation, managing and controlling generally whatever services any of the ships of the petitioner corporation might require in loading or reloading. He was a general manager in California as distinguished from one in charge of a branch or department in a particular district * * *.”

In *The Thew Shovel Company v. Superior Court*, 35 Cal. App. (2d) 183, at page 192 the court states:

“The purpose of Section 406a, Civil Code [predecessor of Corporations Code 6500], is fulfilled if one of sufficient dignity is served to reasonably assure notice to the corporation.”

The cited cases demonstrate that in the construction of the California Code sections dealing with service of process upon a foreign corporation the California courts have adopted a somewhat liberal attitude, namely, that if the agent served is of sufficient stature to make it appear reasonable that his cor-

porate principal will be notified of the service, then such agent is the proper person for service, and such service is consequently good service on the principal.

That service upon a *corporate* agent by serving an officer or general manager of said agent is effective service upon the corporate agent's principal has long been accepted in the Federal courts. Thus, in *Clover Leaf Freight Lines v. Pacific Coast Wholesalers*, 166 Fed. (2d) 626 at page 631, we find the following language:

“Ordinarily, service on a foreign corporation doing business in another state may be made by service on its agent in said state. Here the agent of the foreign corporation is a domestic corporation. The avoidance of the service by the foreign corporation may not be accomplished because the agent is a local corporation rather than an individual. If the service on the local corporation—the agent—is good as to said local corporation, it follows that it is good as to the principal, the foreign corporation. Here the service on the president of Transport Co. was service on said domestic corporation. It was therefore good as service on the foreign corporation.”

To paraphrase, “The service on Heinen, the manager of Pacific, was service on said Pacific; it was therefore good as service on the foreign corporation, Gravely.”

See also:

Littman v. Morris B. Sachs, 65 N.Y.S. (2d) 754;

The State ex rel. New York Oil Co. v. Superior Court, 143 Wash. 641, 265 P. 1030;
Industrial Research Corp. v. General Motors Corp., 29 F. (2d) 623;
Postal Teleg. Cable Co. v. Thornton, 153 Ky. 176, 154 S.W. 1100;
Cutler v. Cutler-Hammer Mfg. Co., 266 F. 388;
Majestic Co. v. Orpheum Circuit, Inc., 21 F. (2d) 720.

II. GRAVELY WAS DOING BUSINESS IN CALIFORNIA THROUGH ITS SUBSIDIARY AND AGENT, PACIFIC, AT THE TIME OF SERVICE OF PROCESS.

A reading of the record, we feel certain, will disclose how completely and to what extent Pacific acted as the agent and *alter ego* of its parent and principal, Gravelly. At the outset we desire to state that the test of whether or not Gravelly was doing business in California through its agent, Pacific, does not depend upon the subsidiary-parent relationship between the two corporations, but rather the *principal-agent* relationship. In this case we find both, and hence there is no escaping the conclusion that Gravelly was doing business in California through its agent, Pacific. On pages 153, 154 of the record we find the following testimony of John Williams Heinen, manager of Pacific:

“Mr. Carroll: Q. You made the termination on Mr. Hall’s authorization, did you not?

A. Through his original permission, naturally, instructions.

Q. And acting as his agent?

A. Acting as his agent.

* * * * *

Q. You serviced their accounts so far as labor goes?

A. Right.

Q. When the Gravely Company received inquiries, it sent them out here for you to service?

A. Right.

Q. Did you do that all over California or just Southern California?

A. Mostly in Southern California.

Q. And they sent you lists of prospects from the Gravely Motor Plow and Cultivator Company?

A. Right.

Q. And you investigated those prospects?

A. Right.

Q. And you reported back?

A. Right.

Q. As a matter of fact, you were required to file reports for the Gravely Motor Plow and Cultivator Company in regard to that list of prospects, were you not?

A. New accounts that were good, yes.

* * * * *

Q. But you have reported back, results of your interviews with prospects?

A. Yes.

Q. If any complaints or difficulties arise with the users of equipment of the Gravely Motor Plow and Cultivator Company in Southern California, do you take care of those?

A. Yes.

Q. That has been your practice since you have been appointed?

A. Yes."

In addition thereto, Gravely by its own admission characterized Pacific as a *branch office*. On page 89 of the record, appears a portion of an exhibit consisting of a Gravely bulletin sent to Carter on or about August 7, 1945. This bulletin refers to Pacific as a *branch* and gives the address of its *branch* in California. Unfortunately, all of the exhibits received in evidence at the time of the hearing on appellant's motion to quash, which bore materially on the question of whether or not Gravely was doing business in California, have been lost by the Clerk of the District Court and are not available to this court. However, a portion of one of these exhibits just referred to is in the record, but the remainder of the exhibit has never been found. Furthermore, one of appellant's own exhibits, to-wit Exhibit DD, consists of another Gravely bulletin received by Carter on June 10, 1945, wherein it is stated:

"Sales division established. Twelve new convenient *branches* have been established at strategic points in the United States. The controlling stock is owned by this Company. The purpose of these is to help you and will not in any way interfere with the work of each agent. *It will bring the factory and its policies close to the agent.* Meetings will be planned at these new headquarters. New contracts will be furnished through these corporations outlining full territory and other general conditions. (R. 140.) (Emphasis added.)

Actually twenty subsidiary corporations were formed by Gravelly similar to its subsidiary in California, Pacific.

On the general question of what constitutes doing business in a given jurisdiction by a foreign corporation, it has been said,

“Myriads of opinions have been published upon the oft-debated issue of the validity of service of process upon corporations in varying factual settings. There would seem to be no benefit to be derived from a standard discussion of other cases merely to point out the circumstances either analogous to or distinguishable from those confronted in the case at bar. We would refer to an erudite opinion upon the general topic written by Judge (Now Mr. Justice) Rutledge, in *Frene v. Louisville Cement Co.*, 77 U.S. App., D.C. 129, 134 Fed. 2d, 511, 515, 146 A.L.R. 926, wherein he asserted that the fundamental principle underlying the ‘doing business concept’ seems to be the maintenance within the jurisdiction of a regular, continuous course of business activities, whether or not inclusive of the final stage of contracting; and that very little more than ‘mere solicitation’ is now required to effectuate the result that a foreign corporation is ‘present’ in a state for jurisdictional purposes.”

Bach v. Friden Calculating Machine Co., 167 Fed. (2d) 679, 680.

In *Bomze v. Nardis Sportwear, Inc.*, 165 Fed. (2d) 233, Judge Learned Hand discusses the new test evolved by the United States Supreme Court on the question of what constitutes doing business in the

case of *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. This new test is what is known as that of "balancing convenience". Judge Hand states:

"The Supreme Court there declared that the corporation's 'presence' was to be determined by balancing the opposed interests: the convenience of the obligee against the burden upon the corporation."

As a matter of fact, the general subject of what constitutes doing business in California has been gone into very thoroughly in a number of California cases, and we believe that local law is controlling on this issue, since this action was originally commenced in the California courts and removed to the Federal Court by appellant. In the case of *The Thew Shovel Company v. Superior Court*, supra, the court had before it a somewhat similar factual situation to the instant case so far as the use of distributors in California by a foreign corporation was concerned. In that case The Thew Shovel Company was represented in California by two distributors, the Rix Company, Inc., in Northern California, and the LeRoi-Rix Machinery Company, Inc., in Southern California. Each distributor was granted the exclusive right to sell or buy for sale certain products of the manufacturer in a defined area and the right to sell direct in certain instances. In connection with sales by the distributor the prices were fixed by the manufacturer. The distributor was required to make weekly written reports to the manufacturer of all prospects and of the status

of transactions. It is interesting to note that the agreement between the distributor and the manufacturer contained the following provision:

“The reason for this ruling covering consignment machines and their sale is to avoid the possibility of being involved in intrastate business where there might be evidence that we were doing business within the state without having taken out a license to do so. Some states have very peculiar laws in this respect, and to protect ourselves on deferred payment sales, it is absolutely necessary that the above procedure be religiously followed when a machine is sold from a consignment depot.”

The court, concluding from all the evidence that The Thew Shovel Company was doing business in California through its distributors, stated:

“It appears that petitioner’s desire not to be involved in intrastate business arose from its unwillingness to take out a license and to comply with the attending tax regulations. Whether it succeeded in legally attaining its object is not necessary to pass upon in this proceeding. Suffice to say that whether the business conducted was interstate or intrastate makes no difference if petitioner was ‘doing business’ in the State of California within the meaning of that term as used in Section 411, Code of Civil Procedure. * * *

“From the foregoing we conclude that the trial court was justified in determining that petitioner was transacting business in a substantial way in this state during the period when, according to the complaint, the alleged cause of action arose,

and that the above activities constituted 'doing business' as that term is used in section 411, Code of Civil Procedure. (*Chas. Ehrlich & Co. v. J. Ellis Slater Co.*, 183 Cal. 709 (192 Pac. 526); *Davenport v. Superior Court*, 183 Cal. 506 (191 Pac. 911); *Winfield v. United Fruit Co.*, 135 Cal. App. (Supp.) 791 (24 Pac. (2d) 247); *Milbank v. Standard Motor Const. Co.*, supra; *Davis v. Motive Parts Corp.*, 16 Fed. (2d) 148; *Murphy v. Campbell Soup Co.*, 40 Fed. (2d) 671; *Knapp v. Bullock Tractor Co.*, supra; *Cheli v. Cudahy Bros. Co.*, 260 Mich. 496 (245 N.W. 503); *International Harvester Co. v. Kentucky*, supra; *Pli-brico Jointless Firebrick Co. v. Waltham Bleachery & Dye Works*, 274 Mass. 281 (174 N.E. 487).)''

The *Thew Shovel Co.* case was approved most recently in the case of *Sales Affiliates, Inc., v. Superior Court*, 96 Cal. App. (2d) 134, 214 P. (2d) 541. In this latest case on the subject, the court states:

"Our decision as to whether petitioner was shown to have been doing business in California is simplified by the absence of conflict in the evidence as to the material facts. In the comparatively recent cases of *Thew Shovel Co. v. Superior Court*, 35 Cal. App. 2d, 183, 95 Pac. 2d 149, and *West Publishing Co. v. Superior Court*, 20 Cal. 2d 720, 128 Pac. 2d 777, there will be found a full discussion of the factors which determine whether a foreign corporation is doing business in this state, as well as a consideration of leading Federal and state cases. There is no need for us to indulge in repetitious analysis of the authorities. Every factual situation where the question arises calls for a comparison of the business ad-

vantages derived from the methods employed by the corporation, with those it would enjoy if it conducted its business through its own offices or paid agents in the state. *If the representation which petitioner maintained in the state gave it in a practical sense and to a substantial degree the benefits and advantages it would have enjoyed by operating through its own office or paid sales force, it was clearly doing business in the state so as to be amenable to civil process.*” (Emphasis supplied.)

The italicized portion of the above-cited quotation is the determining factor in this as well as any other case involving the question of doing of business by a foreign corporation in California. A reading of the record in the case at bar demonstrates that Gravely enjoyed every benefit and advantage operating through its wholly owned subsidiary, Pacific, that it would have enjoyed if it had operated its own office with its own paid sales force in California. No other conclusion is possible from the facts disclosed by the record, nor is it necessary to cite and quote from a multitude of cases from many jurisdictions in order to nail down the point.

It will serve no useful purpose to comment in detail upon the cases found and relied upon in appellant's brief on the general subject of jurisdiction. We have no quarrel with the general principles of law enunciated in and by these cases. The difficulty is that in applying them to the instant case, or for that matter, to any other case, they do not constitute au-

thority, for the obvious reason that in this field of law, as has been stated in innumerable cases, each case must be decided on its own particular set of facts. A determination that a particular foreign corporation is doing business in a particular state is bottomed primarily on a factual determination of what its activities consist of in that state. It may operate in that state in a number of different ways. If, however, it operates through the use of a subsidiary corporation and if that corporation is in fact an agent for the parent or principal, depending upon the type of activity conducted by the subsidiary corporation, then the foreign corporation is held to be doing business.

In the case of *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 634, strongly relied upon by appellant, the court, after reviewing the activities of the corporate subsidiary sales agent on behalf of its parent, Cudahy Packing Co., concludes:

“The Alabama corporation, which has an office in North Carolina, is the instrumentality employed to market Cudahy products within the state; *but it does not do so as defendant's agent.* It buys from the defendant and sells to dealers.” (Emphasis supplied.)

While we admit that it is difficult under the facts of the case as disclosed in the opinion of the court to justify the court's conclusion, nevertheless there can be no quarrel with the *basis* of the court's conclusion. We assume that if the court had found otherwise, it would not have hesitated to hold that the parent cor-

poration was doing business in North Carolina by reason of the activities of its corporate subsidiary therein.

Appellant refers to a comment by *Ballantine* in his work on *Corporations*, Rev. Ed. 1946, at page 325, concerning the case of *Industrial Reserve Corporation v. General Motors Corporation*, 29 Fed. (2d) 623. In that case the court held that General Motors Corporation was doing business in Ohio through the use of its wholly owned subsidiary, Industrial Reserve Corporation. Apparently Mr. Ballantine, being concerned primarily with the preservation of the fiction of corporate entity and disagreeing with the conclusion reached by the court in that case, criticizes the opinion. It is interesting, however, to note a contrary view expressed in the relatively recent case of *Pergament v. Frazer*, 93 Fed. Supp. 9, wherein the court, on page 12, states:

“There has been a change in the attitude of the courts towards this much debated and perplexing question that has been before our tribunals for years and there is a tendency now to cut through the maze of corporate appearances to arrive at the true status and relationship. The fiction of corporate entity is no longer controlling. It is possible and permissible for a corporation not to desire to do business in a certain state and to create a separate corporation for that purpose. But if the separate corporation is actually so attached to the parent that the parent is in fact doing business in this state then the court must not permit vociferous contrary claims of the par-

ent to prevail. In the modern development of our business and general economic life, with the great possibilities of almost complete annihilation of space and time, the courts do not and should not encourage the creation of corporate empires which have subsidiaries trading on the strength of the main organization's name, financial position or products, only to have those who deal with the main organization, through the subsidiaries, learn that when question of suit arises it is necessary for the offended party to travel across the continent at great expense and inconvenience in order to find a jurisdiction where his suit may be tried. If this were an ordinary creditor bringing a law suit against defendant 'Metals' one's thought would rebel at such a conclusion of law. That it is a stockholders' suit does not change the fundamental equities. The following cases are indicative of the liberal trend the new decisions are taking. *Industrial Research Corp. v. General Motors Corp.*, D.C. 1928, 29 F.2d 623; *Clover Leaf Fr. Lines v. Pacific Coast Wholeslrs. Ass'n*, supra; *Fish v. East*, 10 Cir., 1940, 114 F. 2d 177, and *Commerce Trust Co. v. Woodbury*, 8 Cir., 1935, 77 F. 2d 478."

Finally, we desire to comment briefly upon the case of *Krane v. Gravely Motor Plow and Cultivator Company*, 69 N.Y. Supp. (2d) 175. It is true that in that case the New York Supreme Court, Appellate Division, held that Gravely was not doing business in New York State through its wholly-owned subsidiary, Gravely-Eastern. The decision of the majority of the court, however, fails to discuss any facts

but simply concludes that Gravel was not doing business through its subsidiary. A dissenting opinion was filed which we desire to quote from, not because we rely upon it as authority, but simply to illustrate the manner in which courts arrive at contrary conclusions from the same set of facts.

“D. Ray Hall, president and director of both defendant and its subsidiary, while acting in his capacity as defendant’s president, has in writing referred to “our selling and service organization in the eastern area’ and also our ‘branch office in New York City’. Gravelly-Eastern, the subsidiary served, is defendant’s representative in that area. * * *

This case is not within the rule that mere ownership without more does not bring a parent company into a state so as to render it amenable to process. The subsidiary in question is one of nineteen subsidiary corporations owned by the defendants. The facts sufficiently show that the subsidiary was the defendant’s agent here and that the defendant, the parent company, was doing business here through its agent.”

III. DURING THE YEARS 1943 TO 1946 CARTER WAS A DEALER ON BEHALF OF GRAVELY IN NORTHERN CALIFORNIA AND FORWARDED TO GRAVELY DURING THIS PERIOD OF TIME ORDERS FOR 122 TRACTORS. ALL OF THESE ORDERS WERE ACCEPTED BY GRAVELY, BUT GRAVELY NOTWITHSTANDING ITS ACCEPTANCE, SOUGHT TO AVOID THE FILLING OF THE ORDERS BY DISCHARGING CARTER AS ITS DEALER ON AUGUST 23, 1946.

It is admitted that Carter placed with Gravelly orders for 122 tractors between the years 1943 and

1946. (R. 101.) Gravely admits that it received the orders. (R. 100, 101, 116, 117.) Early in the war years it urged Carter to take as many orders as possible and promised that such orders would be filled in the order in which they were received. Appellee's Exhibit No. 12 consists of a Gravely bulletin sent to Carter, dated January 1, 1943, which contained the following directions:

“New orders: Take just as many orders as you can. Tell everyone the true facts on delivery. In other words, no promises whatever excepting that after the picture changes, naturally our backlog of orders will be filled in order.

We don't want you to slacken your efforts to sell our equipment for agricultural work. Sell the customer on the merits of the Gravely and on the thought of getting the equipment when you are able to furnish it.” (R. 176.)

In addition to urging Carter to take as many orders as it could, Gravely sent out form acknowledgments to Carter's customers upon receipt of orders. These form acknowledgments were introduced in evidence as Appellant's Exhibits HH and II and start out by stating:

“In accepting your order we call your attention to the facts which we list as follows:

“The order is placed with the understanding that we will fill it as quickly as possible. We cannot recognize promised or implied time of delivery.”

and it concludes:

“Indeed you have chosen wisely, and you will again be wise in waiting until you can get a Gravely, knowing full well that we will supply it just as soon as it is possible.”

In addition thereto, Mr. D. Ray Hall, president of Gravely, was examined at the trial of this action concerning the matter of acceptance, as follows:

“Mr. Carroll: Q. As a matter of fact, Mr. Hall, it is true, is it not, that you did accept all of these orders for delivery as soon as you were able to make them?

A. That’s right.

Q. You told the customers that, and you told your dealers that, did you not?

A. That’s right, with the qualifications as pointed out in the rest of the letter.” (R. 180 and 182.)

Code of Civil Procedure of California, Section 1962, subdivision 3, provides:

“Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.”

Gravely, through its president, D. Ray Hall, admitted in answer to questions that no order submitted by Carter had ever been declined—that so far as he recollected he had never notified Carter that an order was not accepted. (R. 213.)

The cases cited by appellant dealing with acceptance are not concerned with the factual situation that is present in the instant case, nor are they concerned with the point of law that is determinative of the facts found here. All of the cases relied upon by appellant are cases involving a single transaction between independent business concerns having no prior relationship, agreement, arrangement, contract or undertaking between them. It is true enough that under the Law of Contracts there must be a clear offer and clear acceptance. In the present case appellant by its spoken and written words led appellee to believe that all of its orders placed with appellant in good faith would be filled in the order in which they were received, at such time as appellant was able to get back into peacetime production. In addition to taking orders for Gravely tractors, Carter performed other tasks for Gravely. It exhibited its machines at county and state fairs, advertised its products, serviced its machines, instructed ultimate purchasers in the use of the same, and generally looked out for and protected the interest of Gravely over the years. As the trial court aptly stated in its Decision, Findings of Fact, and Conclusions of law, dated March 10, 1950:

“The orders for 122 tractors, the subject matter of this action, were the result of solicitation by the plaintiff with the knowledge, consent, and at the request of the defendant. Plaintiff at all times was ready, willing and able to pay the manufacturer’s ‘list price’ of each of the tractors ordered at the

time or before delivery was to be made. If defendant decided to refuse these orders it was within its right in such refusal, but defendant must compensate plaintiff for services rendered, and an accurate and fair measure of that compensation is on the basis of the 'discount'. (*Taylor Manufacturing Co. v. Hatcher Manufacturing Co.*, 39 Fed. 440; *Gantner & Mattern Co. v. Hawkins*, 201 Pac. 2d 847, holding that 'A principal cannot deprive his agent of commissions on goods ordered through the agent by discharging him before the orders are filled.' ")

In addition to these cases, the following cases establish that an agent is entitled to his commissions upon all orders submitted and accepted by his principal prior to his discharge.

See:

Zinn v. Ex-Cell-O Corp., 24 Cal. (2d) 290, and cases cited therein;

Taylor v. Enoch Morgan's Sons Co., 124 N.Y. 184, 26 N.E. 314;

White Company v. W. P. Farley & Company, 219 Ky. 66, 292 S.W. 472;

Erskine v. Chevrolet Motor Company, 185 N.C. 479, 117 S.E. 706;

Watson v. Oregon Moline Plow Co., 112 Ore. 414, 227 Pac. 278;

Stephany v. Hunt Bros., 217 Pac. 797;

Parke v. Frank, 75 Cal. 364.

In *Taylor Manufacturing Co. v. Hatcher*, *supra*, the court stated:

“The view of the Taylor Company that the clause in its contract which obliged it to furnish the engines Hatcher might require, if the exigencies of its business permitted, is important, is altogether erroneous. This clause must have a practical and equitable construction. It did not give it the power arbitrarily that the exigencies of the business would not permit the engines to be furnished. It must have a valid reason for such a conclusion, and its validity must be shown by evidence. The courts of equity would never, in the absence of express declarations, construe such a clause to mean that, notwithstanding the services and expenditures of the Hatcher Company, the Taylor Company could at pleasure refuse to do anything toward the performance of the obligations it had undertaken.”

The general rule may be found in 3 C.J.S., Section 185b, under the following heading: “Principal’s duty to fill agent’s orders”:

“Ordinarily in the absence of a provision to the contrary in the agency contract, under a selling agency, where the agent’s compensation is to be from commissions on sales, the principal is bound to accept and fill all orders sent in by the agent which in the exercise of an honest business judgment he would accept if he were actuated only by genuine business motives, and a principal who arbitrarily refuses or fails to sell to a purchaser who fulfills the requirements of the contract of agency is liable to the agent in damages.”

In *Gantner & Mattern Co. v. Hawkins*, supra, the court's opinion recites the following facts:

“Hawkins continued in the employment of appellant until February of 1945. At that time Hawkins visited San Francisco, where appellant's principal place of business is located, and informed John O. Gantner, Jr., that he was resigning from appellant's employment to devote his entire time to the business of Koret of California and possibly to engage in the future in the retail business. Gantner informed Hawkins that he would not be paid commissions on any articles thereafter shipped into Hawkins' territory on orders already obtained by Hawkins. Hawkins then refused to resign and Gantner discharged him.

Thereafter the defendant Hawkins was sued by the plaintiff company for declaratory relief. In that suit the defendant filed a cross-complaint for the commissions due him on goods sold by him before his discharge. From a judgment awarding him commissions on his cross-complaint, plaintiff appealed. In affirming the judgment of the lower court, the appellate court stated:

“The claim that as a part of the consideration for his commissions respondent was bound to continue his good will services is answered

1. by respondent's testimony that he offered to perform such services and his offer was refused;
2. by an adverse finding on conflicting evidence against the claim that the contract bound respondent to continue such services in order to earn his commissions on sales already made; and

3. by the fact that such a construction of a contract at will would be most unreasonable *since it would put it in appellant's power to deprive respondent of commissions at any time by discharging him after orders were obtained and before they were filled. It is the general rule that a principal cannot deprive his agent of commissions on goods ordered through him by discharging him before the orders are filled. (Zinn v. Ex-Cell-O Corp., 24 Cal. 2d 290, 296 [149 P. 2d 177]).*" (Italics supplied.)

CONCLUSION.

The Decision, Findings of Fact and Conclusions of Law of the trial court in this case are fully supported by the evidence and are correct, and the record discloses no reversible error. Accordingly, appellee respectfully prays that the judgment of the trial court be affirmed and that appellee recover its costs on appeal.

Dated, San Francisco, California,
June 25, 1951.

Respectfully submitted,
DAVID FREIDENRICH,
CARROLL, DAVIS & FREIDENRICH,
Attorneys for Appellee.

No. 12,844

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GRAVELY MOTOR PLOW AND CULTIVATOR
COMPANY (a corporation),

Appellant,

VS.

H. V. CARTER Co., INC. (a corporation),

Appellee.

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

REPLY BRIEF FOR APPELLANT.

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Appellee.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

REPLY BRIEF FOR APPELLANT.

I.

JURISDICTION OF GRAVELY WAS NOT OBTAINED BY SERVICE OF PROCESS ON THE MANAGER OF ITS SUBSIDIARY, PACIFIC.

A. Neither Pacific nor Heinen, its manager, was an agent of Gravelly.

Appellant does not contend that the service of process on Heinen was defective because of his position with Pacific, or, in the language of the cases, that he lacked "sufficient dignity". Its position in this respect is that the service of process on Heinen was

defective because neither he nor Pacific, his employer, was an agent of Gravely.

There is no evidence in this case to support appellee's assumption that Pacific was the agent of Gravely so as to make the latter amenable to service of process through service on Pacific. The functions of Pacific as a distributor for Gravely were no more indicative of an agency relationship than was the exercise of similar functions by Carter when it acted as an exclusive distributor for Gravely in this area prior to Pacific's incorporation. Gravely's transactions with Carter and subsequently with Pacific were merely sales in interstate commerce, or, to put it more simply, created the status of buyer and seller.

The fact that the seller is a parent corporation and the buyer its subsidiary does not alter the actualities of the situation. The court said in *General Acc., Fire & Life Assur. Corp., Ltd., of Perth, Scotland v. Goodyear Tire & Rubber Co.* (1940), 25 N.Y.S. (2d) 68, 70:

“The mere fact that a wholly owned corporation sells products of the owner does not make it the agent of the latter so as to permit service of process upon it.”

See also:

Schenstrom v. Continental Machines (1947), 7 F.R.D. 434.

It is similarly well settled that the subsidiary corporation does not become the agent of the parent merely because of ownership of the subsidiary's stock

by the parent, or because the same officers serve both companies.

Peterson v. Chicago R. I. & P. R.R. (1906),
205 U.S. 364, 27 S.Ct. 513, 51 L. Ed. 841.

Appellee's efforts to distinguish the instant case from the facts of *Cannon Mfg. Co. v. Cudahy Packing Co.* (1924), 267 U.S. 333, 45 S. Ct. 250, 69 L. Ed. 634, are abortive since that decision clearly holds that marketing of the parent corporation's products by the subsidiary does not create an agency relationship.

The facts in the present case and those in *Littman v. Morris B. Sachs* (1946), 65 N.Y.S. (2d) 753; *State ex rel. New York Oil Co. v. Superior Court* (1927), 143 Wash. 641, 255 P. 1030; *Industrial Research Corp. v. General Motors* (1928), 29 F. (2d) 623; *Cutler v. Cutler Hammer Mfg. Co.* (1920), 266 F. 388; and *Majestic Co. v. Orpheum Circuit, Inc.* (1927), 21 F. (2d) 720, are quite dissimilar. In *Littman v. Morris B. Sachs* (supra), the facts do not indicate the actual corporate separation that exists in the case at bar. The facts of *New York Oil Co. v. Superior Court* (supra) show that the parent was the operating corporation and that the subsidiary was a complete dummy, existing in name only and without any actual corporate existence.

Industrial Research Corp. v. General Motors (supra), discussed by appellant in its opening brief, distinguishes itself from the instant case and the *Cannon* case at page 626 by the following language:

“In the case considered by the Supreme Court (referring to *Cannon v. Cudahy*) there was no attempt to hold the moving defendant liable for an act or omission of its subsidiary, and for that reason alone cases concerning substantive rights such as those cited in the opinion of the Supreme Court are not applicable.” (Reference added.)

In *Cutler v. Cutler Hammer Mfg. Co.* (supra) no formal corporate separation existed and, of course, this case was decided prior to *Cannon v. Cudahy* (supra). *Majestic Co. v. Orpheum Circuit, Inc.* (supra) is inapplicable and, if anything, tends to support the position of Gravely.

B. Gravely at no time has transacted business in California.

Carter refers to many cases defining “doing business” by a foreign corporation. However, the cited authorities do not deviate from the fundamental proposition that a foreign corporation is not deemed to be conducting business in a state, so as to subject itself to service of process, because it markets its products through a subsidiary.

Consolidated Textile Corp. v. Gregory (1933),
289 U.S. 85, 53 S. Ct. 529, 77 L. Ed. 1047.

The facts in *Garber v. Bancamerica-Blair Corp.* (1939), 205 Minn. 275, 285 N.W. 723, are analogous to the facts in the instant case. At page 727 the court said:

“Where, however, the corporate separation is maintained and the subsidiary conducts it own

business, the subsidiary, not the parent, is doing the business. In that situation the foreign parent cannot be said to be doing business in the state.”

In the instant case, Pacific was doing business in California, but not Gravely. That Hall from time to time communicated with Heinen does not alter the case. Hall was the president of Pacific, as well as president of Gravely, and the activities carried on by Pacific at the behest of Hall were the normal activities of the distributor, and obviously were not a transaction of business by the parent corporation.

Appellee, in its brief, assigns Exhibit DD as evidence that Gravely was doing business in this state. It is readily apparent that the agents referred to in that exhibit were those firms and individuals situated in the same circumstances as Carter, i.e., those to whom Pacific might sell equipment. In *Guile v. Sea Island Co.* (1947), 66 N.Y.S. (2d) 467, at page 469, the court said:

“The fact that the defendant employed the words ‘New York Office’ in its literature is no evidence that it was in fact ‘doing business’ at that office.”

Thew Shovel Co. v. Superior Court (1939), 35 C.A. (2d) 183, 95 P. (2d) 149; *Sales Affiliates, Inc. v. Superior Court* (1950), 96 C.A. (2d) 134, 214 P. (2d) 541, and *Pergament v. Frazer* (1949), 93 F. Supp. 9, cases upon which Carter relies heavily, are readily distinguishable from the case at bar. In *Thew Shovel Co. v. Superior Court* (supra) the manufacturer reserved the right to make sales to customers of cer-

tain classes without paying discounts or commissions to the distributors, title to consigned goods was retained by the manufacturer and contracts for the resale and notes on account of deferred payments were assigned to and accepted by the manufacturer; and installation service was provided and other activities performed by it. When the activities of Thew Shovel Co. are contrasted with those of Gravely, there is an obvious distinction. The activities which Thew Shovel Co. carried on are the functions that Gravely expected of Pacific.

To the same effect is *Sales Affiliates, Inc. v. Superior Court* (supra). Therein agreements and counter-agreements are found between the foreign corporation and distribution outlets, on both the wholesale and retail level. Sales Affiliates' persistent operation on the retail level completely distinguishes its activities from that of Gravely. The opinion in *Pergament v. Frazer* (supra) candidly discloses that it is colored by the broad Michigan statute.

The remaining authorities cited by Carter turn on the decision rendered in *International Shoe Co. v. State of Washington* (1945), 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95. This case reviews the subject of "doing business" for jurisdictional purposes, which, incidentally, calls for the exercise of independent judgment by the Federal Court, both in actions originally commenced therein and in actions removed thereto. See *Hedrick v. Canadian Pac. Ry. Co.* (1939), 28 F. Supp. 257; *Cohen v. Boulevard Frocks, Inc.* (1938), 26 F. Supp. 771. The facts of *Interna-*

tional Shoe Co. v. State of Washington (supra), demonstrate its complete inapplicability to the case at bar. International Shoe Company employed eleven to thirteen salesmen in the State of Washington. These salesmen were under the direct supervision and control of International Shoe Company's home office in St. Louis, they resided in Washington, confined their activities to that state, and were compensated by commissions based on sales made in that state. In addition to the foregoing, the salesmen from time to time rented office space in the state of Washington for which they were reimbursed by International Shoe Company. In addition to the dissimilarity of facts, the issues in the *International Shoe Company* case were quite different. Therein the court was considering a tax matter and also passing on the ability of the state to define for its own purpose what constituted doing business.

Appellant respectfully submits that it was not doing business in this state either through its own activity or the activities of its subsidiary, Pacific; that the relationship of principal and agent does not exist between Gravely and Pacific, and that, therefore, the attempted service of process in this case must be held invalid.

II.

**THERE WAS NO ACCEPTANCE BY GRAVELY OF THE
ORDERS OF CARTER FOR 122 TRACTORS.**

A. Neither Gravelly nor Pacific acknowledged the order of July 3, 1945 for 45 tractors.

Appellant is unable to agree with appellee in its statement that "It is admitted that Carter placed with Gravelly orders for 122 tractors between the years 1943 and 1946". It is undisputed, however, that prior to the incorporation of Pacific in 1945, Carter placed with Gravelly orders for 77 tractors, i.e., the 47 orders for ultimate purchasers and the group order of June 28, 1943, for 30 tractors. (Exh. FF.) Subsequent to 1945, Carter's dealings were primarily with Pacific, the distributor of Gravelly products in California and other western states, from whom it was endeavoring to obtain an exclusive agency contract. The only tractors which could have been and which were received by Carter after the year 1945, were purchased from and delivered by Pacific. (R. 141.) On July 3, 1945, Carter placed with Pacific the group order for 45 tractors (Exh. X), which was accompanied by the proposed agency agreement signed by Carter but which was never executed by Pacific. It is admitted that an information copy of this order was sent by Carter to Gravelly but no acknowledgment whatsoever was made by either Pacific or Gravelly of its receipt.

The trial court in its first decision found "That on July 3, 1946, plaintiff placed an order with 'Pacific' for 45 tractors (Exh. X in evidence); that said order for 45 tractors was never acknowledged or accepted by 'Pacific'." (R. 62.) This finding does not ap-

pear in the second and final decision of the trial court. In both decisions judgment was ordered in favor of Pacific. The final decision of the trial court is therefore obviously inconsistent since there having been no acceptance or acknowledgment by Pacific of this group order for 45 tractors, similarly there was no acceptance or acknowledgment thereby by Gravely.

B. Gravely's acknowledgments of the remaining orders for 77 tractors were definitely qualified.

Appellee's reference to the form acknowledgments (Exh. HH, I) and the testimony of D. Ray Hall, president of Gravely and also Pacific, clearly indicate that the orders for the 77 tractors placed with Gravely if accepted at all, were accepted with definite qualifications. In the acknowledgments sent to the 47 ultimate purchasers Gravely stated definitely that "Due to Government restrictions we cannot guarantee delivery of the equipment on your order * * * We cannot recognize any promised or implied time of delivery * * *" The acknowledgment by Gravely of the group order of June 28, 1943, for 30 tractors advised Carter that "But, at any rate, we would appreciate the order and will hold it until such a time as we can see what we can do in the way of shipping. I am not at all sure that we could get that much equipment * * *" (Exh. FF reverse side.)

C. Appellee's authorities on the contractual issue are distinguishable from the instant case.

An examination of the decisions cited by appellee discloses that they are not in point on the contractual question involved in the instant case. Appellant ob-

viously cannot quarrel with the rule laid down by cases such as

Taylor Manufacturing Co. v. Hatcher Manufacturing Co. (1889), 39 Fed. 440,

and

Gantner & Mattern Co. v. Hawkins (1949), 89 Cal. App. (2d) 783, 201 Pac. (2d) 847,

cited by the trial court in its final decision, that a principal cannot deprive his agent under a selling contract of commissions on goods ordered through the agent by discharging him before the orders were filled.

To the same effect are

Zinn v. Ex-Cell-O Corp. (1944), 24 Cal. (2d) 290, 149 Pac. (2d) 177;

Taylor v. Enoch Morgan's Sons Co. (1891), 124 N.Y. 184, 26 N.E. 314;

White Company v. W. P. Farley & Company (1927), 219 Ky. 66, 292 S.W. 472;

Erskine v. Chevrolet Motor Company (1923), 185 N.C. 479, 117 S.E. 706;

Watson v. Oregon Moline Plow Co. (1924), 112 Ore. 414, 227 Pac. 278;

Parke v. Frank (1888), 75 Cal. 364, 17 Pac. 427.

In *Taylor Manufacturing Co. v. Hatcher Manufacturing Co.* (supra) there was a written exclusive contract whereby defendant became the agent of plaintiff for the purpose of selling engines in a large number of counties in Georgia. In affirming a judgment on the cross-bill of defendant, the court at page 449 said:

“The Taylor Company appealed to the court for an exercise of its equitable powers in their behalf—they must themselves do equity. They must pay the Hatcher Company for their expenses legitimately incurred. *They must pay the [the] profits which the Hatcher Company would have made by the engines they promised to deliver and which were refused.*” (Emphasis added.)

Gantner & Mattern Co. v. Hawkins (supra) was a case involving an oral contract under which Hawkins was employed as a salesman in the southern part of the United States upon a commission basis on goods actually delivered. After a dispute had arisen, Hawkins advised Gantner & Mattern Co. that he was resigning from their employment and he was thereupon informed that he would not be paid commissions on any articles thereafter shipped into his territory on orders already obtained by him. He then refused to resign and was discharged. At page 788 (89 Cal. App. (2d) 783) the court said:

“It is the general rule that a principal cannot deprive his agent of commissions on goods ordered through him by discharging him before the orders are filled.”

Stephany v. Hunt Bros. Co. (1923), 62 Cal. App. 638, 217 Pac. 797, is entirely inapplicable to the contractual issue in the present case.

It is undisputed that there was no contract employing Carter as an agent or distributor of either Gravelly or Pacific. During the years when the orders for the

122 tractors were placed with Gravely and Pacific, Carter was, therefore, a non-exclusive dealer of Gravely products and its profits resulted from discounts allowed on orders for tractors which were accepted. The instant case is not one involving an agency contract or commissions earned by an agent. The question before this court is relatively simple, to-wit: was there an unqualified and unequivocal acceptance by Gravely or Pacific of Carter's orders. The undisputed evidence clearly shows that this fundamental legal requirement is lacking.

CONCLUSION.

Appellant Gravely respectfully prays that the judgment of the trial court be reversed.

Dated, San Francisco, California,
July 5, 1951.

Respectfully submitted,
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Appellee.

Appeal from the United States District Court,
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Southern Division.

APPELLEE'S PETITION FOR A REHEARING.

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FILED

DEC 26 1951

PAUL P. O'BRIEN
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APPELLEE'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

The Court of Appeals in its opinion determined that the District Court lacked jurisdiction *in personam* over Gravelly Company "because a service of summons on one John W. Heinen, General Manager of Gravelly-Pacific, Inc., a corporate subsidiary of Gravelly Company, was not a service on it." The opinion then proceeds to devote two short paragraphs

to the all-important question of whether or not the record established that Gravely Company was doing business in the State of California at the time of the service of process. The first paragraph devoted to this subject merely states that the court agrees with our opponent's contention that it was not doing business in California, and in the second paragraph the court seems to feel that in order to prove that a foreign corporation is doing business in another state, it must be established that such foreign corporation delivered merchandise into that state.

While this may be true if there is no other evidence in the record, in the instant case the evidence adduced at the trial conclusively shows that Gravely Company was doing business in California, not by reason of any activities of its own in California, but by reason of the activities of its agent, to-wit, Gravely-Pacific, Inc.

The opinion of the court then attributes a number of contentions to Carter Co., which we respectfully submit were never contended for by it in any of its briefs at the trial of the action or otherwise, specifically:

(a) Carter Co. does *not* contend that Heinen was Gravely Company's agent for the service of process.

(b) Carter Co. does *not* claim that Heinen as General Manager of Gravely-Pacific, Inc. is a person authorized by Gravely Co. to receive service of process.

(c) Carter Co. does *not* contend that the relationship between the two corporations warranted the District Court inferring such an authorization as the basis of its denial of the Motion to Quash.

(d) The Motion to Quash was *not* submitted on affidavit alone without *viva voce* testimony.

(e) Carter Co. does *not* contend that Hall in all likelihood would be advised by letter from Heinen of the latter's receipt of summons in February 1947.

Carter Co. *does* contend, and we believe the record supports the contention, that Gravely Co. was doing business in California at the time of service of summons upon Heinen by virtue of the activities of its agent, Gravely-Pacific, Inc. Gravely-Pacific, Inc. being a corporate agent, service upon it must be made upon one of its officers, or upon the person designated by it as its agent for service of process. That person, the record discloses, was Heinen. Accordingly, Heinen was not served individually, but merely as the agent for the service of process upon Gravely-Pacific, Inc., and Gravely-Pacific, Inc. was served in two capacities:

1. As a defendant in the action;
2. As the corporate agent for and on behalf of Gravely Company.

Carter Co. *does* contend that Gravely-Pacific, Inc. was the general manager of Gravely Company in California by reason of its numerous activities in California on behalf of Gravely Company. To cite but

one, we refer to Gravely-Pacific's notification to Carter Co. dated August 23, 1946, terminating Carter Co.'s future services on *behalf* of Gravely Co. (Plaintiff's Exhibit 3.) No one but a general manager, in our opinion, would have authority to fire a dealer or distributor who had acted in such capacity for the principal for over twenty years.

Carter Co. *does* contend that Gravely-Pacific, Inc. was the wholly owned subsidiary of Gravely Co., and in addition thereto was its agent or general manager, and that it is for the latter reason that the California courts acquired jurisdiction over Gravely Co. rather than the mere fact of the subsidiary character of the one corporation to the other.

It is our belief that under the law of California the test of whether or not a foreign corporation is doing business in California is a relatively simple one. The rule is to be found in *Sales Affiliates, Inc. v. Superior Court*, 96 Cal. App. (2d) 134, 214 Pac. (2d) 541. The rule laid down by the court in that case is certainly broad enough to be determinative of the question presented in the instant case. It may be that the facts in that case were stronger than in the instant case, but the rule announced by the court as the sole determining factor in cases of this character fits the present case to a "T":

"If the representation which petitioner maintained in the state gave it in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operating

through its own office or paid sales force, it was clearly doing business in the state so as to be amenable to civil process.”

This is the test laid down by the court in the *Sales Affiliate* case, without qualification. The court does *not* state that the evidence must show that the foreign corporation delivers goods into California, or that the representation cannot be by a corporate agent as well as an individual agent, nor does it require the court to make inferences in lieu of evidence.

The Court of Appeals in the instant case recognizes that the law of California controls, for early in its opinion it states:

“The burden of proving a jurisdictional service within the California law is upon Carter Co.”

This means that the case of *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 strongly relied upon by Gravelly Co. and favorably cited and quoted from by the court in the instant case is not, in our opinion, determinative on the question of jurisdiction for the reason that in that case the Supreme Court was interpreting the law of North Carolina rather than the law of California, and hence the decision is not controlling.

We have read the opinion of the court in this case a great number of times, and we are unable to determine exactly what test this court applies on the subject of either doing business or of proper service on a foreign corporation in California. We feel the

court reached erroneous conclusions from erroneous facts, and accordingly a new hearing should be granted the appellee in order to set the records straight.

Dated, San Francisco, California,
December 24, 1951.

Respectfully submitted,

CARROLL, DAVIS & FREIDENRICH,

By DAVID FREIDENRICH,

*Attorneys for Appellee
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
December 24, 1951.

DAVID FREIDENRICH,
*Of Counsel for Appellee
and Petitioner.*

